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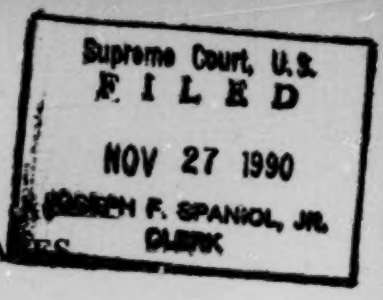

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

WAYNE KUNZ; OLIVE KUNZ;
GLEN V. TURNER; CAROL TURNER, ET AL.,
Petitioners,

—v—

UTAH POWER & LIGHT CO.,
a Maine corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a state tort law regime which allows recovery of damages for floodwaters *negligently* cast upon an individual's land by a utility operating a reservoir to generate hydropower, but which denies a remedy or recovery for floodwaters *intentionally* so cast, violates the Due Process Clause?

2. Whether denial of a remedy or recovery to a landowner whose property is *intentionally* flooded and taken for public use for four years by a utility operating a reservoir to generate hydropower, particularly where the utility is vested with the power of eminent domain under state law, violates the Just Compensation and/or Due Process Clauses?

PARTIES TO THE PROCEEDING

The names of all parties to the appeal to the opinion of the Court of Appeals for the Ninth Circuit are the following:

Petitioners Kunz et al. under Second Amended Complaint:

Wayne Kunz and Olive Kunz
David H. Jensen, Don W. Jensen and Neil B. Jensen, d/b/a Jensen Ranch and Dairy
Leon and Alice Hardcastle
Fred Wells
Lynn Wells
Glen Grunig and Judy Grunig
Larry Alleman and Carolyn Alleman
Montpelier Irrigation Company
Gary Thompson
Lyle Stephens
Rex Linford
John K. Ipsen
Dan Stewart
Fred Hunzeker

Petitioners Turner et al. under Amended Complaint:

Glen V. Turner and Carol Turner
Ronald K. Panter and Barbara Panter
Lyman Anderson and Darla Anderson
Keith Barthlome and Phylis Barthlome
Dean Burton and Lois Burton
Craig Elsmore and Lynn Elsmore
Jim W. Elsmore and Coy Elsmore
Kimball Evans and Patsie Evans
Michael C. Harris and Nan Harris
Allan R. Horsley and Helen Horsley

C. Robert McGregor and Relda McGregor
Dwayne Mendenhall and Ann Mendenhall
Lawrence D. Mickelson and Linda Mickelson
Riley L. Mickelson and Barbara T. Mickeslon
Raymond Ostler and Voneal Ostler
Randy Ostler and Trina Ostler
Randy Panter and Trina Panter
Del W. Smith and Carmen Smith
Harris Stephenson and Ruth M. Stephenson
Gladys R. Williams

Respondent: Utah Power & Light Company, a Maine corporation.

STATEMENT PURSUANT TO RULE 29.1

Petitioners believe that Pacific Power & Light Company is the parent corporation by merger of Respondent Utah Power & Light Company.

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Petitioners,

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UTAH POWER & LIGHT CO.,
Respondent.

OPINION BELOW

The opinion of the United States Court of Appeal for the Ninth Circuit affirming the judgment against Petitioners (hereinafter "Landowners") is reproduced in the Appendix at la-13a from the slip opinion, which is also reported at 913 F.2d 599 (9th Cir. 1990).

The advisory opinion of the Supreme Court of the State of Idaho answering certified question of law is reproduced in the Appendix at 14a -24a and reported at 117 Idaho 901, 792 P.2d 926 (Idaho 1990). The majority opinion without lengthy disserting opinion of Justice Bistline only is reproduced.

The interlocutory opinion of the Court of Appeals for the Ninth Circuit certifying questions of law to the Idaho Supreme Court is reproduced in the Appendix at 25a-31a from the slip opinion, which is also reported at 871 F.2d 85 (9th Cir. 1989).

JURISDICTION

The Court of Appeals for the Ninth Circuit's final dispositive opinion affirms the judgment against Petitioners Kunz et al. and Turner et al. (Landowners") in favor of Respondent Utah Power & Light Company ("Utah Power"), and was filed August 29, 1990. It

recites these facts, among others, proved by the evidence:

> "Unfortunately, from 1983 through 1986, the Landowners' lands were flooded by stored and naturally flowing water which were respectively discharged and 'bypasses' by Utah Power. Injury to both real and personal property resulted." (Appendix 5a, citing Slip. Op. at 9713).

Utah Power's conduct discharging floodwaters from its reservoir into the natural channel of Bear River is expressly characterized as *"deliberate"* (Appendix 4a, 6a, citing Slip. Op. at 9712 and 9714) and *"intentional"* (Appendix 7a, 8a, citing Slip Op. at 9715, note 3, and 9716).

The Ninth Circuit's interlocutory opinion similarly recites these facts proved by the evidence:

> "During the period between 1983-1986, the Spring runoff were unusually heavy. During this period landowners' lands were flooded by stored and naturally flowing waters which were respectively discharged and 'bypassed' by Utah Power from Bear River into the natural channel of Bear River in amounts exceeding the carrying capacity of the natural channel." (Appendix 28a, citing 871 F.2d at 87 (9th Cir. 1989).

Again, the Ninth Circuit's interlocutory order accurately characterizes Utah Power's discharge of stored water as *"intentional"* in its factual recital (Appendix 26a, citing 871 F.2d at 86), and in its formulation of questions certified to the Idaho Supreme Court (Appendix 30a - 31a, citing 871 F.2d at 88).

Answering the certified questions, the Idaho Supreme Court held that strict liability, direct trespass, and nuisance theories do not state a recognized cause of action under Idaho law on these facts given by the circuit court's order, including those quoted above. The State Supreme Court held further that Landowners' claim is "not maintainable against Utah Power on the facts of this case in the

absence of proof of negligence." Appendix 23a, citing 792 P.2d at 931.

Adopting the Idaho Supreme Court's declaration that negligence is the "sole cause" recognized by state law on which Landowners may base a potential claim, the circuit's final opinion affirmed the judgment entered below on the jury's special verdict that Utah Power was "not negligent." It also rejected Landowners' challenges to jury instructions and evidentiary rulings on the negligence cause.

As discussed below, this disposition providing no remedy and no recovery of damages or just compensation for the proven *deliberate* and *intentional* injury or taking of Landowners' lands for four years, *"absent proof of negligence"*, violates the Due Process and Just Compensation Clauses of the Fifth and Fourteenth Amendments to the *Constitution of the United States*.[1]

The federal constitutional claims were timely presented and preserved below.

The two Landowners' complaints allege Utah Power's intentional discharges and regulation of the system flooding their lands is a "taking" for which "just compensation" is owing; Utah Power's lack of any grant, right, or easement to intentionally flood their lands; recites the 1920 "Dietrich Decree" by which Utah Power acquired its diversion and storage water rights in the historical basin-wide water rights adjudication, including express provisions providing Utah Power may make discharges "into the natural banks" only but *not* exceeding the channel's carrying capacity in amounts which overflow the banks. Appendix, 37a -39a, reproducing material excerpts of *Kunz et al. Second Amended Complaint*, paragraphs 5-13; Appendix 42a - 44a, reproducing material excerpts of *Turner et al. Amended Complaint*, paragraphs 2-9, alleging materially identical factual allegations as the *Kunz* complaint; Appendix 34a, reproducing material excerpts of *Dietrich Decree*. These allegations plead an action for inverse condemnation, thereby implicating constitutional just compensation and due process

[1]The *Constitution of the State of Idaho*, Article 1, §§13 and 14, provide similar just compensation and due process protections.

protections.

The federal constitutional claims were also timely raised in Landowners' Reply Brief filed in the Ninth Circuit. Appendix at 50a- 51a, reproducing material excerpts. Said claims were also raised in Landowners' Opening Brief and Reply Brief filed in the Idaho Supreme Court in the certification proceeding. Appendix at 54a - 56a [Opening Brief]; Appendix at 58a - 59a [Reply Brief], reproducing material excerpts.

This Court has jurisdiction to review the judgment of the Court of Appeals for the Ninth Circuit under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT XIV:

"No state shall ... deprive any person of life, liberty, or property, without due process of law..."

UNITED STATES CONSTITUTION, AMENDMENT V:

"(P)rivate property [shall not] be taken for public use without just compensation."

STATEMENT OF CASE

The Just Compensation and Due Process clauses are violated by a state tort law regime which denies a remedy and all recovery of damages or just compensation for a proven *intentional* and *deliberate* injury or taking of private property "in the absence of proof of negligence." Particularly, where the party causing the *intentional* injury or taking is a utility operating a reservoir for irrigation, hydropower and other declared "public uses", and possesses the power of eminent domain, the lack of a remedy is constitutionally untenable. The issue is squarely presented here.

The Landowners' complaints, brought pursuant to the federal

district court's diversity jurisdiction as between citizens of different states (28 U.S.C. §1332), allege an injury or taking of their lands by floodwaters discharged by Utah Power from Bear Lake Reservoir into the natural channel of Bear River, which overflowed the banks onto their lands; that Utah Power is liable for that damages or just compensation by reason of such flooding; that Utah Power has no flood easement or other legal right under the *Dietrich Decree* or otherwise to physically invade their lands, destroy crops, and deprive them of its use for extended periods. For example, the *Kunz et al.* complaint alleges in the following excerpted paragraphs:

6.

> That pursuant to said "Dietrich" and "Kimball" decrees [adjudicating water rights in Idaho and Utah] Defendant Utah Power and Light Company is entitled to *impound and store water in Bear Lake and release the same down the natural channel of Bear River for the generation of electric power and for irrigation purposes.*

* * *

9.

> That Defendant Utah Power and Light Company *does not have any grant, right, or easement for the flooding of Plaintiffs' lands adjacent* to the Bear River by virtue of the "Dietrich Decree" or otherwise.

* * *

12.

> That Defendant, in the operation of its power generation facilities on Bear River, has caused and continues to cause

the flow levels of the river to be rapidly raised and lowered on a frequent basis for the purpose of maximizing power generation during peak loads. *Said flow fluctuations have caused unnatural, excessive, and continuous erosion and deterioration of the river banks, resulting in a taking of Plaintiffs' lands by Defendant without just compensation for which Defendant is liable to Plaintiffs.*

13.

That commencing on or about June 6, 1983, after peak spring runoffs subsided and Plaintiffs had undertaken to plant, raise, harvest crops upon their land, Plaintiffs' lands were continuously flooded until result of the operation of the Bear Lake/Bear River water storage system by Defendant, as a result of which Plaintiffs have suffered damage to their crops, real property and other facilities and other general and consequential damages of Plaintiffs' damages has not been ascertained and Plaintiffs' reserve the right to amend their complaint to assert claims for additional damage as according to proof at the time of trial. Additionally, should Plaintiffs' lands be further flooded in the period between the time of the filing of this Complaint and the trial of this action, Plaintiffs reserve the right to further amend their complain in regard thereto." (Emphasis supplied) (Appendix 37a - 39a.)

The *Turner et al.* Amended Complaint, paragraphs 2, 3, 5, 7-9, contains identical material factual allegations as the above-quoted excerpts from the *Kunz* complaint. Appendix 42a -44a.

The Circuit Court's factual recitation concluded the material factual allegations of the complaints necessary to establish liability for *intentional* tortious flooding injury or a four-year taking constituting a compensable inverse condemnation were proved by the evidence.

The Ninth Circuit, clearly focusing on the *intentional* characterization and nature of Utah Power's conduct causing the flooding injury or taking, certified questions to the Idaho Supreme Court as to whether strict liability, direct trespass, or nuisance

causes of action were stated under Idaho law.

The Idaho Supreme Court purported to answer the certified questions in the negative. It held that strict liability, direct trespass, and nuisance were not viable causes of action under Idaho law. It held further that Landowners' claim could not be maintained "in the absence of negligence" under the recited facts. Appendix 23a, citing 792 P.2d at 931. Inexplicably, the Idaho Supreme Court failed to persuasively explain or distinguish between "intentional" and "negligent" tortious conduct. Its opinion also selectively and incompletely addresses the given facts. It focuses only on Utah Power's right to discharge into the natural channel, but ignores the *further* given fact overflowing the banks for four years. It unpersuesively attempts to distinguish *Smith v. King Grazing Association*, 105 Idaho 644, 671 P.2d 1107 (Ct.App. 1983) and reach the desired result that no nuisance cause exists, stating:

> "In any event, the *Smith* court held that an upper landowner may alter the flow in a natural watercourses' long as it remains within the watercourse.' 105 Idaho at 647, 671 P.2d at 1110. *Under this analysis, Utah Power acted within its legal rights by discharging stored water within the natural watercourse of the Bear River.*" (Emphasis supplied.) (Appendix at 24a, citing 792 P.2d at 931.)

This reasoning clearly "misses the boat," ignoring the essential crux by Landowners' claim predicating liability for tortious injury or inverse condemnation *on the discharged water overflowing the banks onto their lands for four-years, which the circuit deemed proven by the evidence on the given facts*. Obviously, no complaint would be made and the case never filed if Utah Power's discharges had stayed within the natural banks of the Bear River.

Contrary to its cases decided on a negligence standard of liability relied on by the Idaho Supreme Court, Utah Power's flooding of Landowners' lands was *not* the result of an accidental break in the dam or canals; nor intended nor inadvertent within the meaning of "negligence," i.e., lack of ordinary care. Rather, the flooding was the result of Utah Power's *intentional* and consciously-deliberated

and - adopted operating plan. The dam gates were opened and left open for an extended four-year period. The purpose was to evacuate the reservoir to a lower stage level. Amounts released were clearly understood and known to exceed the carrying capacity of the natural channel. The flooding effects of discharged water overflowing the banks for four years was also well-known, recognized, observable, and understood by Utah Power to be the consequence of its releases. No "accidental" or "negligent" miscalculation produced the excessive releases. When water overflowing the banks onto Landowners' lands was observed by Utah Power, releases were not "cut back" to confine discharges within the banks; excessive discharges were continued despite the certain and continuing observed effects.

Landowners' Opening Brief, Point VI, argued that their private property rights could not be lawfully taken without just compensation consistent with due process, particularly given Utah Power's right of eminent domain, raising the constitutional claims. Appendix 54a - 56a, excerpting pertinent pages of Landowners' Brief.

Landowners' similarly raised and expressly argued just compensation and due process constitutional claims in their Reply Brief filed in the circuit court. Appendix 50a - 52a, excerpting pertinent portions.

The circuit court uncritically adopted the Idaho Supreme Court's declaration that "negligence" was the only cause "maintainable against Utah Power on the facts of this case" (Appendix 6a, 10a, citing Slip Op. at 9714, 9718), despite its factual determination that Utah Power's *intentional* and *deliberate* conduct produced the injury. Such findings make an *intentional* tortious wrong or, alternatively, a compensable taking under an inverse condemnation cause, as a matter of law. The circuit's application of the law declared by the Idaho Supreme Court, in light of the circuit's factual findings, produces an anomalous result.

The effect of the circuit court's ruling is that an *intentional* tortious injury or taking is *not* compensable, whereas a *negligent*

injury *is* compensable. A "catch-22" situation results. The Idaho Supreme Court effectively "defines away" Landowners' constitutional right to not have their lands or property taken for public use without just compensation, and/or to have an adequate remedy to recover damages for the *intentional* tortious physical invasion of their property. No remedy is available to Landowners.

REASONS FOR GRANTING THE WRIT

A wrong without a remedy is inflicted on Landowners under the circuit court's decision affirming the judgment entered below. Utah Power *intentionally* and *deliberately* cast floodwaters upon Landowners' lands incidental to its normal operations. Nevertheless, Utah Power is not liable to Landowners for the resulting injury or taking under the decision. No damages are recoverable for the intentional tortious wrong. No just compensation for the taking of their lands for public use is required. No remedy is available to Landowners. This disposition is a patently unconstitutional result in light of the Just Compensation and Due Process Clauses of the Fifth and Fourteenth Amendments. They mandate a remedy.

A certification procedure properly utilized may clarify state law to be applied by a federal court in a diversity case. However, a circuit court should not uncritically adopt a state's court's effort to "decide" the case on the merits, ignore remaining alternative causes framed by the pleadings and raised on appeal, or ignore the federal constitution claims implicated by a state court's answer to certified questions in conflict with decisions of this Court. A state court's answer to certified questions which ignores material given facts included as part of the certification order should also be carefully scrutinized. In such a situation, the state court's decision, particularly *dicta* going beyond the specific questions certified, should not be applied to reach an unconstitutional result. Landowners submit that the Idaho Supreme Court's opinion should have been deemed unpersuasive for these reasons;

court's; uncritical adoption of the state court's opinion purporting to in effect "decide" the case on the merits adverse to Landowners provides a basis for this Court's exercise of its supervisory powers.

The Idaho Supreme Court's certified answers as applied by the circuit court results in denying Landowners a remedy or recovery for a proven wrong and conflicts with applicable due process and just compensation decisions of this Court. The circuit court's failure to grant Landowners relief on the alternative inverse condemnation cause framed by their complaints, raised in briefing, and proven by the evidence as set forth in the circuit's factual statement, constitutes so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

I.

WHETHER A STATE TORT LAW REGIME WHICH ALSO RECOVERY OF DAMAGES FOR FLOODWATERS *NEGLIGENTLY* CAST UPON AN INDIVIDUAL'S LAND BY A UTILITY OPERATING A RESERVOIR TO GENERATE HYDROPOWER, BUT WHICH DENIES A REMEDY OR RECOVERY FOR FLOODWATERS *INTENTIONALLY* SO CAST, VIOLATES THE DUE PROCESS CLAUSE?

The federal guaranty of Due Process extends to state court action through its judicial, as well as through its legislative, executive, or administrative, branch of government. *Brinkerhoff Faris Trust & Savings Co. v Hill*, 281 U.S. 673, 74 L.Ed. 1107 (1930). A violation of the due process guaranteed under the Fourteenth Amendment may be accomplished by the state judiciary in the course of construing statutory or unwritten law. *Id.* However, whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no right to destroy, unless there is, or was, afforded to him some real opportunity to protect it. 281 U.S,

at 682, 74 L.Ed. at 1114.

It is universally recognized tort law across the Untied States that torts involving injury or damage to real or person property may result from negligent *or* intentional conduct, and a remedy exists for either. Moreover, *intentionally* inflicted harm is more culpable conduct than merely *negligent* caused harm. Indeed, punitive damages may be available for *intentional* torts, whereas *negligence* without aggravating factors results in compensatory damages being available. Nowhere is it the law that one who *negligently:* causes injury to person or property is liable, but one who *intentionally* causes the same injury is not liable. Idaho is consistent with the rest of the United States on these issues. These points are "black letter" or "hornbook" law. While case citations could be readily obtained from any state or jurisdiction, they are so fimily rooted in the common law and our national jurisprudence as to be axiomatie.

A state common law tort regime as declared by a state's highest court so narrowly drawn as to afford a remedy and recovery for *negligent* conduct taking or damaging a person's real or personal property, but denying one *intentionally* caused, is so utterly devoid of logic, reason, consistency, equity, or fundamental fairness as to constitute a violation of due process. *See, Otis Co. v. Ludlow Manufacturing Co.*, 201 U.S. 140, 26 S.Ct. 353, 50 L.Ed. 696 (1906) The circuit court's decision, adopting the state tort law declared by Idaho's highest court, provides no adequate remedy or opportunity for Landowners' to protect their private property rights from being wrongfully physically invaded or taken. Landowners' due process rights are violated by this disposition. *Id.*

II.

WHETHER DENIAL OF A REMEDY OR RECOVERY TO A LANDOWNER WHOSE PROPERTY IS INTENTIONALLY FLOODED AND TAKEN FOR PUBLIC USE FOR PUBLIC USE FOR FOUR-YEARS BY A UTILITY OPERATING A RESERVOIR TO GENERATE HYDROPOWER, PARTICULARLY WHERE THE UTILITY IS VESTED WITH THE POWER OF EMINENT DOMAIN UNDER STATE LAW, VIOLATES THE JUST COMPENSATION AND/OR DUE PROCESS CLAUSES?

The state, through its highest court, or other authorization to operate for declared public uses or by granting the eminent domain power, cannot authorize a *public* utility to take private property without just compensation. *DeSalvo v. Arkansas Louisiana Gas Company*, 239 F. Supp. 312 (D.Ark. 1965), citing *Bailey v. Anderson*, 326 U.S. 203, U.S. 66 S. Ct. 66, 90 L.Ed. 3; *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 67 L.Ed. 322; *Hairston v. Danville & Western Ry. Co.*, 208 U.S. 598, 28 S.Ct. 331, 52 L.Ed. 637; *United States ex rel. Tennessee Valley Authority v. Powelson*, 319 U.S. 266, 63 S.Ct. 1047, 87 L.Ed. 1390, and others.

The Fifth Amendment provides "nor shall private property be taken for public use, without just compensation." It applies to the states through the Fourteenth Amendment. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 107 S.Ct. 2378, 2383, note 4 (1987), citing *Chicago, B & O R. Co. v. Chicago*, 166 U.S. 226, 17 S. Ct. 581, 41 L.Ed. 979 (1897). Thus, if a state or any political subdivision takes private property for public use, just compensation is owing under the Fifth Amendment. *First English Evangelical Lutheran Church v. County of Los Angeles, California, supra.*.

The rule is the same for a taking by the federal government flooding damage resulting from the normal operation of dams controlling the flow of a river. For example, in a case closely analogous factually to the instant case, the Court of Claims held that

the United States liable to compensate Landowners for a taking caused by recurring flooding of their lands above the high-water mark of the river, ordering that a flowage easement was taken. *Barnes v. United States*, 538 F.2d 865 (Ct.Cl. 1976).

In *United States v. Cress*, 243 U.S. 316, 329, 37 S.Ct. 380, 385, 61 L.Ed. 746 (1917), this Court also recognized the taking of a flowage easement in real property "where land is not constantly but only at intervals overflowed..."

First English Evangelical Lutheran Church v. Los Angeles County, supra, makes clear that even a *temporary* taking is compensable under the Just Compensation Clause, which is a self-executing remedy.

Flooding to some of Landowners' lands has occurred several times historically, and will inevitably recur in the future given Utah Power's operating objective to totally fill the reservoir and resulting high storage level maintained. *See e.g., Kunz v. Utah Power & Light Co.*, 526 F.2d 500 (9th Cir.1975) (1972-73 flooding to *Kunz* et al.). At minimum, a *temporary* taking is proven by the four-years flooding in 1983 through 1986 which the circuit determined was proved by the evidence, and entitles Landowners to relief under the *First English Evangelical Lutheran Church* case. Furthermore, the *temporary* taking in 1983-1986, coupled with the prior years' flooding on several occasions shown by the evidence below and the 1975 *Kunz v. Utah Power & Light Co.* case, demonstrates a taking of a flowage easement for intermittent and inevitable recurring flowing under the *Cress* rationale.

The foregoing rules apply equally to Utah Power in the instant case because the flooding was occasioned by the government-authorized action.

Utah Power is authorized by the State to construct and operate the system under state water law, and the *Dietrich Decree* through which its water rights were acquired including the right to discharge stored waters into the natural channel of Bear River but not overflow the banks onto adjacent lands.

In *Johnson v. Utah Power & Light Co.*, 215 F.2d 814 (9th Cir.

1954) the *Dietrich Decree*, was construed. The circuit held that no nuisance arguably existed under state law where the level of flow in Bear River was increased due to Utah Power's reservoir discharges *but remained within the natural banks*. It noted:

> "No claim was made that the water overflowed his land or in any way departed form the natural channel of the river." (215 F.2d at 815)

The rationale of the *Johnson* opinion clearly suggests that a different result would have followed *if* Utah Power's discharges had overflowed the banks, as occurred in the instant case. Utah Power can point to no source of law giving it a right to intentionally overflow the banks with discharged water with impunity, excerpting the Idaho Supreme Court's and circuit court's opinions herein.

Utah Power also operates under authority of state law for the declared *public uses* of constructing "reservoirs or storage basins for the purpose of irrigation..."; "to convey water to the place of use for any useful, beneficial or necessary purpose, or for drainage..." *Idaho Constitution*, Article 1, §14; Idaho Code §7-701 *et seq.*

Consistent with such "public uses," the state constitution grants the power of eminent domain to private entities, subject to the condition of just compensation. *Id.* Unquestionably, Utah Power has the right to condemn the lands of dispute, or flowage easements therein. Indeed, Utah Power has acquired much land adjacent to Bear River susceptible to flooding, or flowage easements therein, by private purchase as the evidence below and the 1975 *Kunz v. Utah Power & Light Co.* case disclose. The mere fact that Utah Power declined to exercise the power of eminent domain cannot operate to deprive Landowners' of just compensation for the taking. As noted in *First English Evangelical Lutheran Church v. Los Angeles, County*, 107 S.Ct. at 2386-87, "the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings," citing *Pumpelly v. Green bay Co.*, 13 Wall. 166, 177-78, 20 L.Ed. 557 (1872) (construing the Wisconsin Constitution's identical Just Compensation Clause),

and "(l)ater cases [which] have unhesitatingly applied this principle," namely, *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S. Ct. 383, 62 L.Ed. 332 (1979); *United States v. Dickinson*, 331 U.S. 745, 750, 67 S.Ct. 1382, 1385, 91 L.Ed. 1789 (1947); *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946).

The three-state Bear River Compact and Commission, comprised of representatives of the states of Idaho, Utah, Wyoming, also further evidence states action involving Utah Power's operations on the Bear Lake-Bear River System.

These characteristics of decreed water rights, state water law, eminent domain power, declared "public uses", heavy state regulation of general power and electrical rate structures of hydropower produced by Utah Power's generating plants on Bear River in Idaho, all evidence significant state action closely entwined with Utah Power's operation, and which subject it to the constraints of the Just Compensation and Due Process Clauses.

Landowners' claims regarding inverse condemnation is also ripe for review as they have met this Court's requirement that state procedures be followed first. The additional alternative inverse condemnation claim for relief plead in their complaints, which is denied by the Idaho Supreme Court's decision holding that"negligence" is the sole basis for relief in its certified decision herein. *See, First Evangelical Lutheran Church*, 107 S.Ct. at 2384, note 6, citing *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194, 105 S.Ct. 3108, 3121, 87 L.Ed. 2d 126 (1985).

A state may not circumvent the effect of the Fifth Amendment by merely delegating to a private entity the power of eminent domain, rather than acting directly itself; circumvent the Fifth Amendment through its highest court by so limiting the remedy that just compensation is recoverable only for a *negligent* taking but not an *intentional* taking, consistent with the just compensation and Due Process protections of the amendments. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*,

supra; Otis Co. v. Ludlow Manufacturing Co., supra; Brinkerhoff-Faris Trust & Saving Co., v. Hill, supra.

CONCLUSION

Based on the foregoing, Petitioner Landowners submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 26, 1990

Opinion of the United States Court of Appeals

for the Ninth Circuit

(Final dispositive opinion)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WAYNE KUNZ; OLIVE KUNZ; GLENN V. TURNER; CAROL TURNER, *Plaintiffs-Appellants,* v. UTAH POWER & LIGHT CO., *Defendant-Appellee.*	No. 87-4361 D.C. No. CV 84-4085-MJC OPINION

Appeal from the United States District Court
for the District of Idaho
Marion J. Callister, Chief District Judge, Presiding

Argued and Submitted November 1, 1988
Withdrawn from submission September 28, 1989
Resubmitted April 6, 1990
Seattle, Washington

Filed August 29, 1990

Before: Otto R. Skopil, Jr., Dorothy W. Nelson and Melvin Brunetti, Circuit Judges.

Opinion by Judge Nelson

SUMMARY

Water and Water Rights

The court affirmed a judgment. Relying on a recent ruling by the Idaho Supreme Court, the court held that the applicable standard of liability in cases where Idaho landowners

were damaged by deliberate discharge of water stored for irrigation and related purposes into a natural stream is a negligence standard.

Appellee Utah Power & Light Co. used a lake for water storage, to generate hydroelectric power, and for purposes of flood control. Wayne Kunz and other appellants were Idaho farmers who owned or leased riparian lands and a private irrigation company located along a river near the lake, a river from which the water had been diverted. From 1983 through 1986, the landowners' lands were flooded by water which Utah Power discharged from the lake. The landowners sued, alleging negligence, strict liability, trespass, and nuisance. The district court dismissed all non-negligence causes of action for failure to state a claim under Idaho law. A jury found Utah Power not negligent, and the landowners moved for either a JNOV or a new trial. Their motion was denied, and they appealed. The court of appeals certified questions to the Idaho Supreme Court regarding whether the suit could be maintained under any non-negligence theories. The Idaho court responded in the negative.

[1] The Idaho court's decision was based on a determination that artificial water systems serve a crucial role in that state and that liability rules should be accordingly limited. [2] In view of that decision, the district court's dismissal of non-negligence legal theories must be affirmed. [3] The landowners argued that the jury should not have been permitted to consider interests of wildlife, recreation, and fish and game. However, under a negligence standard, it was proper for the jury to consider the interests of all persons who might be injured by that conduct, including persons with interests in wildlife, recreation, and fish and game. [4] Therefore, jury direction to that effect was not error. [5] The landowners also raised several objections to evidentiary rulings. The lower court could properly exclude documents that were irrelevant and related to issues inquired into by the landowners during trial. [6] Evidence of hypothetical natural flow offered by

Utah Power was relevant as to the question of Utah Power's decision to release water. [7] Evidence pointing to a bad business motive of Utah Power was not material in a negligence action. [8] Evidence of Utah Power press releases which the landowners claimed were self-serving was properly used to show that the landowners had notice of potential flooding.

COUNSEL

L. F. Racine, Jr., Racine, Olson, Nye, Cooper & Budge, Pocatello, Idaho, for the plaintiffs-appellants.

Stephen S. Dunn, Merrill & Merrill, Pocatello, Idaho, for the defendant-appellee.

OPINION

NELSON, Circuit Judge:

This case was originally submitted on November 1, 1988. It was withdrawn from submission on September 28, 1989 following our certification of several questions to the Idaho Supreme Court on March 22, 1989. The Idaho Supreme Court responded on April 3, 1990. This case is hereby resubmitted.

Various landowners ("Landowners") brought suit against the Utah Power & Light Company ("Utah Power") for damages to real and personal property caused by water discharged from a lake used as a water storage system by Utah Power. The district court subsequently dismissed all causes of action set forth by the Landowners, except negligence, for failure to state a cause recognized by Idaho law. In a special verdict, the jury found that Utah Power was not negligent and the court entered judgment for Utah Power. The Landowners

appealed, contending that the court below erred in dismissing its alternative, non-negligence theories of liability.

We certified several questions to the Idaho Supreme Court to determine the applicable standard of liability in cases involving damages caused by the deliberate, although non-negligent, discharge of water stored for irrigation and related purposes into a natural stream. The Idaho Supreme Court held that only a negligence standard applies in these circumstances. Accordingly, we affirm the district court's dismissal of the Landowners' alternative theories of liability. The Landowners have also challenged the propriety of the jury instructions on negligence, as well as several evidentiary rulings. We find these assertions to be meritless and we now affirm the district court as to its other rulings.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Bear Lake lies on the border between Idaho and Utah. Bear River begins high in the Uinta Mountains of Utah, meanders back and forth between Utah and Wyoming, flows north some distance into Idaho, and turns back south into Utah, where it ends in the Great Salt Lake. Bear River does not naturally enter Bear Lake, but rather flows past it a few miles to the north. In about 1917, however, the predecessor of Utah Power constructed Stewart Dam on the river, diverting the river's flow southward via canals into Mud Lake, which connects with Bear Lake. Bear Lake is thereby utilized as a reservoir.

After the water reaches Bear Lake, it flows northward out of the lake, by gravity or through pumping, via an outlet canal to rejoin the old natural bed of Bear River some distance north of Stewart Dam. Between certain maximum and mini-

[1]This court in *Kunz v. Utah Power & Light Co.*, 526 F.2d 500, 501-02 (9th Cir. 1975) ("*Kunz I*"), described the Bear River system involved in this case. This background discussion borrows extensively from that opinion.

mum limits (the height of the release gates and the depth of the pumping intake facilities), Utah Power can control the flow out of Bear Lake and can close the lake so that the flow continues directly down the river. The use of Bear Lake for water storage is the central feature of the entire system. The dam, canals, and the control facilities are located within Idaho.

Utah Power operates the system under the authority of various federal statutes, a court decree, and the Bear River Commission. The explicit purposes for which Utah Power is commissioned to operate the system are (1) to store water for irrigation throughout the valley in Idaho and Utah below the Bear Lake facilities, and (2) to generate hydroelectric power. In addition, as *Kunz I* conclusively established, Utah Power is required to use the facilities for flood control, particularly as to the spring runoffs of the watershed. Although flood control is not one of the specified purposes imposed by the authorizations, we recognized in *Kunz I* the duty of care owed by Utah Power to Landowners to control floods. *Kunz v. Utah Power & Light Co.*, 526 F.2d 500, 502-04 (9th Cir. 1975).

The Landowners are numerous farmers who own or lease riparian lands and a private irrigation company located along the Bear River below Bear Lake. Prior to 1917, much of these lands were devoted to orchard grasses and wild hays, which were dependent upon flooding from the natural spring runoffs to maintain their growth. The installation of the water storage system in 1917 harnessed the spring runoffs and stopped the flooding, so the ranchers converted their operations to alfalfa and cereal crops, which will not tolerate floods.

Unfortunately, from 1983 through 1986, the Landowners' lands were flooded by stored and naturally flowing waters which were respectively discharged and "bypassed" by Utah Power. Injury to both real and personal property resulted.

The Landowners filed a complaint in federal district court seeking damages in negligence, strict liability, trespass, or nuisance. The liability and damages issues were bifurcated. The Landowners moved for summary judgment on the liability issue. The court below dismissed all non-negligence causes of action for failure to state a claim recognized by Idaho law. In a special verdict, a jury found Utah Power not negligent. The Landowners subsequently moved for judgment notwithstanding the verdict, or alternatively, for a new trial. Both motions were denied. The Landowners appealed.

The applicable standard of liability in cases involving damages caused by the deliberate, although non-negligent, discharge of water stored for irrigation and related purposes into a natural stream was not clear under Idaho law. We accordingly certified several questions to the Idaho Supreme Court to ascertain whether a suit may be maintained in these circumstances, under Idaho law, in strict liability, direct trespass, or private nuisance.[2] The Idaho Supreme Court responded in the negative, leaving negligence as the sole basis for any potential recovery by the Landowners. *See Kunz v. Utah Power & Light Co.*, No. 18076, slip op. (Idaho Sup. Ct. Apr. 3, 1990).

STANDARDS OF REVIEW

We review de novo the lower court's construction of Idaho law. *Matter of McLinn*, 739 F.2d 1395, 1403 (9th Cir. 1984) (en banc). We also review de novo the lower court's dismissal of the Landowners' non-negligence claims. *See Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1440 (9th Cir. 1987). We review the court's jury instructions to determine whether they fairly and adequately cover the issue of negligence, correctly state the law, and are not misleading. *Thorsted v. Kelly*, 858 F.2d 571, 573 (9th Cir. 1988). However, an error in jury

[2]We did not address the "reasonable use" theory set forth by Landowners since the theory is essentially subsumed under the nuisance theory.

instructions does not require reversal unless the error is more probably than not harmless. *Coursen v. A.H. Robins Co., Inc.* 764 F.2d 1329, 1337 (9th Cir. 1985). Evidentiary rulings are reviewed for an abuse of discretion and are reversible only upon a showing of prejudice. *Jauregui v. City of Glendale*, 852 F.2d 1128, 1132 (9th Cir. 1988).

DISCUSSION

A. ALTERNATIVE THEORIES OF LIABILITY

The Landowners first assert that the district court erred in failing to submit other theories of liability as alternatives to negligence. We were unable to determine whether, under Idaho law, an action may be maintained pursuant to non-negligence theories of liability. Because resolution of this issue necessarily involved the interpretation of ambiguous state law, we turned to the Idaho Supreme Court for guidance.[3] *See Toner v. Lederle Laboratories*, 779 F.2d 1429, 1432 (9th Cir. 1986)("Certification provides a means to obtain authoritative answers to unclear questions of state law.").

We essentially asked the Idaho Supreme Court to determine which of two distinct lines of Idaho cases, which apply different liability standards in circumstances similar to ours,

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[3]We certified the following three questions:

(1) Under Idaho law, may one be held liable without proof of fault for damages caused by the intentional discharge of water?

(2) Under Idaho law, may one be held liable pursuant to a direct trespass theory for damages caused by the intentional discharge of water?

(3) Under Idaho law, may one be held liable pursuant to a private nuisance theory for damages caused by the intentional, but nonnegligent, discharge of water?

Kunz v. Utah Power & Light Co., 871 F.2d 85, 88 (9th Cir. 1989).

most closely applies to the facts presented here—that is, to water from an *artificial* water diversion and storage system *intentionally* released into a *natural* stream channel. One line of cases requires a showing of negligence to impose liability for damages caused by the *accidental* escape, seepage, or percolation of water that is *artificially* brought upon the injured party's land. These so-called "escape" cases do not recognize non-negligence theories of liablity.[4] *See, e.g., Stephenson v. Pioneer Irrigation District*, 49 Idaho 189, 288 P. 421 (1930); *Burt v. Farmer's Co-Operative Irrigation Co., Ltd.*, 30 Idaho 752, 168 P. 1078 (1917). The district court followed the holdings and rationales of this line of cases in dismissing the Landowners' non-negligence legal theories.

In another line of cases, the so-called "alteration or obstruction" cases, liability may be imposed without proof of negligence when a riparian owner of lands abutting a stream *intentionally* obstructs or diverts a *natural* stream, causing damages to either a riparian owner on the opposite side or to owners on land abutting above or below the stream. *See, e.g., Campion v. Simpson*, 104 Idaho 413, 659 P.2d 766 (1983); *Milbert v. Carl Carbon, Inc.*, 89 Idaho 471, 406 P.2d 113 (1965); *Fischer v. Davis*, 19 Idaho 493, 116 P. 412 (1911).[5]

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[4]In *Burt v. Farmers' Co-operative Irrigation Co., Ltd.*, 30 Idaho 752, 767, 168 P. 1078, 1082 (1917), the Idaho Supreme Court stated:

> Under the common law one who diverted water from its natural course did so at his peril, and was held practically to be an insurer against damage which might result from such action. . . . The common law has been modified and relaxed in this and other arid states, so that the owner of an irrigation ditch is only liable for damages occurring to others as a result of his negligence or unskillfulness in constructing, maintaining or operating the ditch.

[5]In *Milbert v. Carl Carbon, Inc.*, 89 Idaho 471, 478, 406 P.2d 113, 117 (1965):

> A riparian owner of land abutting upon a stream, whether navigable or non-navigable, has the right to place such barriers as will prevent his land from being overflowed or damaged by the stream,

The Landowners rely upon the above line of cases in asserting that the Idaho Supreme Court applies an absolute liability approach to facts similar to ours.

[1] On April 3, 1990, the Supreme Court of Idaho decided that the "escape" cases apply to the circumstances here, and accordingly, that negligence is the sole basis of recovery available to the Landowners.[6] The Idaho Supreme Court noted "the crucial role which artificial water systems serve" in Idaho and its consequent practice of limiting liability rules when applied to operators of these artificial water systems. *Kunz v. Utah Power & Light Co.*, No. 18076, slip op. at 6 (Idaho Sup. Ct. Apr. 3, 1990). It further observed the importance of irrigation canals and ditches to Idaho's extensive agricultural economy. *Id.*

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and for the purpose of keeping the same within its natural channel. A riparian owner, however, has no right to place obstruction into the stream for the purpose of changing the natural channel of the stream, or for any other purpose, that would do damage to the riparian owner on the opposite side or to owners of land abutting upon the stream either above or below.

[6]In response to our certification order, the Idaho Supreme Court stated:

> These obstructions of the natural channel cases do not apply to the factual scenario set forth in the Ninth Circuit's certification order. Utah Power, by diverting and storing, and later releasing the flood waters of the Bear River back into the natural channel, is carrying out its duty to 'balance the competing factors, including irrigation, flood control, fish and wildlife, recreation and power generation. .' . . Balancing these competing and often conflicting interests as it must, Utah Power is only held to a standard of reasonableness, *i.e.*, negligence. As the owner and operator of the diversion and storage system, Utah Power 'is not an insurer against all damages arising from [its storage system], but is liable when negligent in the construction, maintenance and operation thereof.'

Kunz v. Utah Power & Light Co., 792 P.2d 926, 931 (Idaho 1990)(citations omitted).

[2] In view of the Idaho Supreme Court decision, the district court must be affirmed as to its dismissal of the Landowners' non-negligence legal theories.

B. JURY INSTRUCTIONS

[3] The Landowners next contend that the jury instructions on negligence were "erroneous" and "confusing." Specifically, the Landowners argue that in asking the jury to consider the purposes for which Utah Power was authorized to operate its dam on Bear River, the jury was improperly permitted to consider the interests of wildlife, recreation, and fish and game. The Landowners assert that by allowing the jury to consider these countervailing interests, the legal duty of flood control owed to the Landowners is essentially negated in favor of these interests to which Utah Power owes no legal duty. However, the Idaho Supreme Court has stated that one " 'owes the duty to every person to use reasonable care to avoid injury to the other person . . . .' " *Alegria v. Payonk*, 101 Idaho 617, 619, 619 P.2d 135, 137 (1980)(quoting *Kirby v. Sonville*, 286 Or. 339, 344, 594 P.2d 818, 821 (1979)). Additionally, in judging whether the conduct of the defendant is negligent toward the plaintiff, the fact that the conduct involves an unreasonable risk of harm to a third party may sometimes be considered. 57A AM. JUR. 2D *Negligence* § 151 (1989). Therefore, under a negligence standard, in order to judge the reasonableness of Utah Power's conduct, it was proper for the jury to consider the interests of all persons who may be injured by that conduct, including those persons with interests in wildlife, recreation, and fish and game.

[4] In sum, we find that the district court properly directed the jury to consider the interests of all persons to which Utah Power owes a legal duty. Because we find that the district court did not abuse its discretion in instructing the jury on the law of negligence, it is not necessary to consider the Landowners' requested jury instructions. We accordingly affirm the district court as to its instruction of the jury.

C. *EVIDENTIARY RULINGS*

[5] The Landowners also argue that six of the lower court's evidentiary rulings were erroneous. The first alleged error concerns the district court's exclusion of the "1971 operating criteria" and "risk analysis curves" documents. These documents set a target level for the elevation of Bear Lake. The Landowners allege that the documents represent corporate policy and tend to prove Utah Power's negligence by demonstrating that an unreasonably high target was set and exceeded in flood years, and that the company had notice and knowledge of the risk that flooding at higher lake elevations would occur. However, there is uncontroverted evidence that demonstrates that the 1971 report was not corporate policy during the relevant years, and the Landowners were unable to prove that the probablity curves were utilized by management in making its operational decisions. Accordingly, the documents appear to be irrelevant. Additionally, the factual issues that the Landowners assert were contained in the documents, including knowledge of previous flooding, were inquired into by the Landowners at trial. Therefore, the lower court may have properly excluded this evidence pursuant to Fed. R. Evid. 402, on grounds of irrelevancy, or Fed. R. Evid. 403, on the grounds that such evidence was cumulative.

[6] The Landowners also challenge the district court's admission of "Calculated Flow" evidence, contending that this evidence was irrelevant, misleading, and distracting. This evidence compares the hypothetical natural flow of Bear River in the absence of Utah Power's facilities, with the actual artificial flow resulting from Utah Power's operations. This evidence, demonstrating the volume of water with which the Landowners would have been required to deal had the runoff been unregulated by Utah Power, as well as the length of time that would have been needed, is relevant because it demonstrates Utah Power's reasonableness in regulating the water. Accordingly, this evidence was properly admitted by the district court.

The district court also admitted evidence on behalf of Utah Power regarding fisheries, wildlife, and recreational interests affected by Utah Power's operations. As discussed above, evidence of all interests that risk injury from Utah Power's conduct is relevant to a consideration of the reasonableness of Utah Power's conduct. The court however, excluded the testimony of Mr. Mickelson, which was offered by the Landowners in order to demonstrate the adverse affect of flooding on downstream wildlife. Although this evidence may have been relevant, we do not find that the Landowners suffered prejudice as a result of the district court's denial of Mr. Mickelson's scant testimony as to what he observed regarding the effects of flooding on wildlife. Accordingly, we find no reversible error here.

[7] The Landowners also claim that the court erred in excluding (1) evidence of land ownership, flood easements along the Bear River, and power and revenues generated from Utah Poer's hydroplants, and (2) prior flood claims against Utah Power. Evidence of revenues and ownership of land and flood easements was presented by the Landowners to show Utah Power's business motive in its operation of Bear Lake. However, neither motive nor intent are material in a negligence action, *see* 57A *Am. Jur. 2d Negligence* §§ 35-36 (1989), and therefore, the district court could have concluded that evidence tending to prove a business motive for Utah Power's conduct was excludable as irrelevant pursuant to Fed. R. Evid. 402.

Additionally, evidence of prior flood claims could have properly been excluded as cumulative, pursuant to F.R.E. 403, since it was offered to prove knowledge or notice of previous flooding, and there was already substantial evidence indicating that Utah Power had notice of prior flooding. Additionally, if any of these claims resulted in offers to compromise, they are properly excluded under Fed. R. Evid. 408.

[8] The Landowners additionally challenge the admission of press releases on behalf of Utah Power, claiming that the

evidence was both self-serving and hearsay. However, the press releases were not offered to prove their truth, *see* Fed. R. Evid. 801(c), but rather to show that the Landowners had notice of the potential flooding circumstances through newspaper and radio. Moreover, the court cautioned the jury not to consider this evidence for its content. Additionally, this evidence was relevant because it rebutted the Landowner's assertion that Utah Power failed to provide advance warning of the floods.

Finally, the Landowners challenge the exclusion of evidence regarding Utah Power's downstream contractual irrigation requirements. The Landowners specifically challenge the exclusion of Exhibit 55, consisting of the opinions and calculations of Dr. Brockway, regarding the amount of water actually required to meet Utah Power's contractual irrigation requirements. This evidence was offered by the Landowners to demonstrate that Utah Power had overstated its irrigation needs. However, Exhibit 55 was properly excluded by the lower court, because Dr. Brockway admitted that the numbers which provided the basis for his opinion and calculations in Exhibit 55 were less than the actual irrigation requirements. Additionally, the Landowners fail to outline the nature of the related testimony that they claim was improperly excluded. Therefore, the lower court cannot be said to have abused its discretion in excluding this evidence.

The Landowners have not proven that the trial court's evidentiary rulings constitute an abuse of discretion, and we accordingly find no reversible error.

CONCLUSION

The district court's judgment in favor of the Utah Power is affirmed.

AFFIRMED.

Opinion of the Supreme Court of the

State of Idaho

117 Idaho 901, 792 P.2d 926

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 18076

WAYNE KUNZ; OLIVE KUNZ; GLENN V. TURNER; CAROL TURNER, et al.,

Plaintiff-appellants,

v.

UTAH POWER & LIGHT COMPANY

Defendant-respondent.

Boise term, December 1989. Filed: April 3, 1990

Frederick C. Lyon, Clerk

Original proceeding. This a certified question of law from the United States Court of Appeals.

Racine, Olson, Nye, Cooper & Budge, Pocatello, Idaho, for appellants. Louis F. Racine, Jr., argued.

Merrill & Merrill, Pocatello, Idaho, for respondent. Stephen S. Dunn argued.

Webb, Burton, Carlson, Pederson & Webb, Twin Falls, Idaho, for amicus Salmon River Canal Co. Lloyd J. Webb argued.

Hon. Jim Jones, Attorney General, Boise, Idaho, for amicus Department of Water Resources. Deputy Attorney General John W. Homan argued.

BAKES, C.J.

This case concerns an action brought in federal court by Kunz and various other landowners ("landowners") against Utah Power & Light Company ("Utah Power") for damages to real and personal property caused when Utah Power discharged water from an

artificial storage system into a natural stream channel thereby flooding the riparian landowners' property. The United States District Court dismissed all the landowners' theories of liability except for the negligence theory. The jury found that Utah Power was not negligent in its operation of the water storage system. The landowners appealed to the United States Court of Appeals, Ninth Circuit, alleging, among other things, that the district court erred in dismissing their alternative non-negligence theories. The Ninth Circuit was unable to determine whether, under Idaho law, an action may be maintained pursuant to strict liability, trespass, or private nuisance for damages caused by the storage and intentional, but non-negligent, discharge of water stored for irrigation and related purposes. Accordingly, the following three questions were certified to this Court by the Ninth Circuit, pursuant to I.A.R. 12.1:

(1) Under Idaho law, may one be held liable without proof of fault for damages caused by the intentional discharge of water?

(2) Under Idaho law, may one be held liable pursuant to a direct trespass theory for damages caused by the intentional discharge of water?

(3) Under Idaho law, may one be held liable pursuant to a private nuisance theory for damages caused the intentional, but non-negligent, discharge of water?

In its order certifying these questions, the Ninth Circuit provided this Court with the following factual summary of the case as it existed in federal court.[1]

> Bear Lake lies on the border between Idaho and Utah. Bear River begins high in the Uinta Mountains of Utah, meanders back and forth between Utah and Wyoming, flows north some distance into Idaho, and finally turns back south into Utah, where it terminates in the great Salt Lake. Bear River does not naturally enter Bear lake; instead it flows past it a few

[1] Although the parties in their briefs and arguments before this Court presented facts outside the Ninth Circuit's certification order, we consider only those facts contained in the order.

miles to the north. In about 1917, however, the predecessor of Utah Power constructed Stewart Dam on the river, diverting the river's flow southward via canals into Mud Lake, which connects with Bear Lake. Bear Lake is thereby utilized as a reservoir. After the water reaches Bear Lake, it flows northward out of the lake, by gravity or through pumping, via an outlet canal to rejoin the old natural bed of Bear River some distance north of Stewart Dam. Between certain maximum and minimum limits (the height of the release gates and the depth of the pumping intake facilities), Utah Power can control the flow out of Bear Lake, and it can close the lake so that the flow continues directly down the river. The use of bear Lake for water storage is the central feature of the whole system. The dam, canals, and control facilities are located within Idaho.

Utah Power operates the system under the authority of various federal statutes, a court decree, and the Bear River Commission (established by the Bear River Compact, a joint effort of Idaho, Utah, and Wyoming). The explicit purposes for which Utah Power is commissioned to operate the system are (1) to store water for irrigation throughout the valley in Idaho and Utah below Bear Lake facilities and (2) to generate hydroelectric power. In addition, as *Kunz I [Kunz v. Utah Power & Light Co.*, 526 F.2d 500 (9th Cir. 1975)] conclusively established, Utah Power is required to use the facilities for flood control, particularly as to the spring runoffs of the watershed. Flood control is not one of the specified purposes imposed by the authorizations but is imposed by common-law negligence principles. *See generally Kunz*, 526 F.2d at 502-04.[2]

[2] In *Kunz I* the United States Court of appeals described the duty of flood control which Utah Power owed to downstream riparian landowners as follows:

> Utah Power must carry the responsibility for avoiding damaging floods. We do not say that it is absolutely liable for flooding, but it must recognize the dependent position in which downstream ranchers have been placed and act accordingly to try, consistent with its other duties, to control floods. Utah Power, therefore, had a duty of care on which liability for negligent damage can be based.

526 F.2d at 504.

Additionally, the Bear River Compact establishes a minimum irrigation reserve level requirement. Under the dictates of the compact, Bear Lake must be maintained at an elevation of 5914.61 [ft.].

Utah Power regulates the storage capacity of Bear Lake by adjusting the lake's elevation. The key period is spring because during that period the runoffs cause a substantial rise in the lake's elevation. The full capacity level of the lake is 5923.65 [ft.]. In regulating the lake elevation Utah Power balances the competing factors including, irrigation, flood control, fish and wildlife, recreation, and power generation. Landowners are numerous farmers who own or lease riparian lands, and a private irrigation company, located along the Bear River below Bear Lake. Prior to 1917 much of these lands were devoted to orchard grasses and wild hays, which were dependent upon flooding from natural spring runoffs to maintain their growth. The installation of the water storage system in 1917 harnesses the spring runoffs and stopped the flooding, so the ranchers converted their operations to alfalfa and cereal crops, which will not tolerate floods.

During the period between 1983-1986, the spring runoffs were unusually heavy. During this period, Landowners' lands were flooded by stored and naturally flowing waters which [2]were respectively discharged and "bypassed" by Utah Power from Bear Lake into the natural channel of Bear River in amounts exceeding the carrying capacity of the natural channel.

In its certification order the Ninth Circuit noted what it concluded was the existence of two distinct lines of Idaho cases what appeared to apply different liability standards in cases that involve flood damage. It described one line of cases as requiring a showing of negligence to hold a party liable for damages resulting from the escape, seepage, or percolation of water carried in an

artificial channel, such as an irrigation canal or ditch. In these artificial channel cases non-negligence based theories of liability, such as strict liability, trespass, or private nuisance, are not recognized. *See e.g., Stephenson v. Pioneer Irrigation District*, 49 Idaho 189, 288 P. 421 (1930); and *Burt v. Farmer's Cooperative Irrigation Company, Ltd.*, 30 Idaho 752, 168 P. 1078 (1917). The Court of Appeals described another line of our cases which involve situations where a *natural* channel is altered or obstructed through the placement of barriers which diminish the ability of the channel to carry its natural volume thereby causing flood damage to another riparian landowner. Under these factual circumstances, the injured riparian landowner may not be limited to a "negligence only" cause of action. *See e.g., Campion v. Simpson*, 104 Idaho 471, 406 P. 2d 766 (1983); *Milbert v. Carl Carbon, Inc.*, 89 Idaho 471, 406 P.2d 113 (1965); *Boise Development Company, Ltd., v Boise City*, 30 Idaho 675, 167 P. 1032 (1917); and *Fischer v. Davis*, 19 Idaho 493, 116 P. 412 (1911). Our task essentially is to determine which line of cases more closely applies to the factual circumstances presented here, which involves an *artificial* water diversion and storage system (Bear Lake) which is subsequently discharged into a natural channel (Bear River) and thereafter causes flooding. For the reasons set forth below, we hold that the *Stephenson* and *Burt* line of cases applies to the facts of this case, and that negligence is the only basis for imposing liability on Utah Power. Accordingly, we respond in the negative to each of the certified questions.

The starting point in our analysis of which line of cases applies to the present case is to explain why a distinction exists between them. For instance, why does Idaho case law limit the theories of liability which can be brought against a irrigation system operator whose canal floods over its banks when other cases arguably place no such limitations on the theories of liability which can be brought against someone who erects a breakwater into the natural channel that causes damage to the property owner on the opposite bank of the stream? The answer to this legal question is based almost entirely on the unique circumstances of Idaho's geography and economy. "The water of this arid state is an important resource. Not only

farmers, but industry and residential users depend upon it." *Miles v. Idaho Power Company*, 116 Idaho 635, ___, 778 P. 2d 757, 767-768 (1989). Because Idaho receives little annual precipitation, Idahoans must make the most efficient use of this limited resource. "The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resource. *Stickney v. Hanrahan*, 7 Idaho 424, 63 P. 189 [(1900)]; *Van Camp v. Emery*, 13 Idaho 202, 89 P. 752 [(1907)]; *Farmers' Co-operative Ditch Co. v. Riverside Irr. Dist.*, 16 Idaho 525, 102 P. 481 [(1909)]; *Coulson v. Aberdeen-Springfield Canal Co.*, 39 Idaho 320, 227 P. 29 [(1924)]; *Reynolds Irrigation Dist. v. Sproat*, 69 Idaho 315, 206 P. 2d 774 [(1949)]; *Ramseyer v. Jamerson*, 78 Idaho 504, 305 P. 2d 1088 [(1957)]; *Mountain Home Irrigation District v. Duffy*, 79 Idaho 435, 319 P. 2d 965 [(1957)]; I.C. §§ 42-101 and 42-104. *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P. 2d 61, 65 (1960). *See also Gilbert v. Smith*, 97 Idaho 735, 552 P. 2d 1220 (1976).

Idaho's extensive agricultural economy would not exist but for the vast systems of irrigation canals and ditches which artificially deliver stored or naturally flowing water from Idaho's rivers and streams into abundant fields of growing crops. Many of these irrigation systems depend on dams which divert naturally flowing water, storing it in reservoirs and later releasing it for use on irrigated lands through canals and ditches. These artificial water storage systems serve an additional need for flood control, power generation, recreation, and provide beneficial environments for fish and wildlife.

This Court has long been cognizant of the crucial role which artificial water systems serve in this state. As a result, limited liability rules have been applied to operators of these artificial water systems. Early on, in *Burt v. Farmers' Co-operative Irrigation Company,Ltd.*, 30 Idaho 752, 767, 168 P. 1078, 1082 (1917) we wrote:

> Under the common law one who diverted water from its natural course did so at his peril, and was held practically to be an insurer against damage which might result from

> such action. [Citing cases] The common law has been modified and relaxed in this and other arid states, so that the owner of an irrigation ditch is *only* liable for damages occurring to others as a result of his *negligence* or unskillfulness in constructing, maintaining or operating of the ditch.[Citing cases]. (Emphasis added.)

In *Stephenson v. Pioneer Irrigation District*, 49 Idaho 189, 194, 288 P. 421, 422 (1930), this Court wrote further that :

> [The owner of an irrigation ditch] is not an insurer against all damages arising from his ditches, but is liable when negligent in the construction, maintenance, and operation thereof. He is, in other words, required to exercise reasonable or ordinary care only in the construction, maintenance, and operation of his ditches.

See also Albrethson v. Carey Valley Reservoir Company, 67 Idaho 529, 186 P. 2d 853 (1947); *Minn v. Twin Falls Canal Company*, 43 Idaho 198, 252 P. 865 (1926); *Nampa & Meridian Irrigation District v. Petrie*, 37 Idaho 45, 233 P. 531 (1923); and *Stuart v. Noble Ditch Company*, 9 Idaho 765, 76 P. 255 (1904). The same policies which compelled this Court to limit the liability of operators of irrigation canals from suit for all but an action in negligence also extends to those entities which operate the artificial water diversion and storage systems, *i.e.*, dams and reservoirs which supply water to the irrigation canals.

This holding does not conflict with the other line of Idaho cases, identified by the Court of Appeals, dealing with the alteration or obstruction of natural streams. *See* Campion v. Simpson, 104 Idaho 413, 659 P. 2d 766 (1983); *Milbert v. Carl Carbon, Inc.*, 89 Idaho 471, 406 P. 2d 113 (1965); *Boise Development Company, Ltd.v. Boise City*, 30 Idaho 675, 167 P. 1032 (1917); *Fischer v. Davis*, 19 Idaho 493, 116 P. 412 (1911). These alteration or obstruction of natural stream cases present facts distinct from those contained in the case before us. Generally, these alteration cases involve situations where one riparian landowner takes measures to improve or protect

its land from the natural stream flow thereby causing an alteration in the natural stream flow which injures another riparian landowner, usually the one on the opposite bank of the stream.

In *Campion*, the two parties involved owned land on the opposite banks of the Wood River at a point where the river naturally flowed through three channels. The defendant filled in two channels to protect his property from flood waters thereby reducing the river's overall channel capacity.[3] When the spring flood waters came the carrying capacity of the remaining channel was exceeded and Campion's property was damaged.

In *Milbert*, the parties owned land on opposite sides of the Palouse River. Milbert complained that Carl Carbon's blasting operations reduced the carrying capacity of the Palouse River during a high spring runoff thereby causing flooding to his land.

In *Boise Development Company*, the city was sued for flood damage to riparian landowners along the Boise River which occurred after the city constructed embankments, dams and riprapping along the opposite bank of the river in order to protect riverside parkland from erosion.

In *Fischer*, dams, cribs and obstructions were erected by Davis in order to protect his property from the Boise River. These measures, however, reduced the carrying capacity of the river thereby causing flood damage to Fischer, the landowner on the opposite bank.

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[3] The operation of an artificial water diversion and storage system may at times diminish the carrying capacity of the natural stream into which it empties due to a lack of natural "scouring" which occurs during spring runoff. Such "scouring" clears the streambed of silt deposits thereby maximizing the stream's carrying capacity. We are not aware of any diminished carrying capacity in the Bear River due to the operation of the Bear Lake water storage system. The certification order only indicates that "naturally flowing waters... were respectively discharged and 'bypassed' by Utah Power into the natural channel of Bear River in amounts exceeding the *carrying capacity of the natural channel*." (Emphasis added.) We understand this to indicate that the amounts released into the natural channel of the Bear River would have caused flooding to the landowners regardless of whether the carrying capacity of the Bear River was diminished by the operation of the water storage system. Even so, we do not like the possible diminution in the carrying capacity of a natural stream channel caused by the operation of a public reservoir to that diminution caused when a private party obstructs of diverts a natural stream channel for private gain. This position follows logically from the initial factual premise - the law of Idaho has developed to encourage the non-negligent management of Idaho's limited water resources in order to advance the economy and livelihood of Idaho's citizenry.

The legal standard applicable to these "alteration or obstruction" cases is described in *Boise Development Company* in which we stated that "liability in such cases [does not] rest solely upon the narrow ground of negligence, but rather upon the broad legal principle that no one is permitted to so use his own property as to invade the property of another." 30 Idaho at 690, 167 P. at 1035. In *Campion* , we recently reaffirmed this standard as previously set forth in *Milbert, Boise Development Company, and Fischer.*

> A riparian owner of land abutting upon a stream, whether navigable or non-navigable, has the right to place such barriers as will prevent his land from being overflowed or damaged by the stream, and for the purpose of keeping the same within its natural channel. A riparian owner, however, has no right to place obstruction into the stream for the purpose of changing the natural channel of the stream, or for any other purpose, that would do damage to the riparian owner on the opposite side or to owners of land abutting upon the stream either above or below.

104 Idaho at 415, 659 P.2d at 768 (emphasis omitted.)

These obstructions of the natural channel cases do not apply to the factual scenario set forth in the Ninth Circuit's certification order. Utah Power, by diverting and storing, and later releasing the flood waters of the Bear River back into the natural channel, is carrying out its duty to "balance the competing factors, including irrigation, flood control, fish and wildlife, recreation and power generation." Order Certifying Question to the Idaho Supreme Court, p.3. Balancing these competing and often conflicting interests as it must, Utah Power is only held to a standard of reasonableness, *i.e.*, negligence. As the owner and operator of the diversion and storage system, Utah Power "is not an insurer against all damages arising from [its storage system], but is liable when negligent in the construction, maintenance and operation thereof." Stephenson v. Pioneer Irr. Dist., 49 Idaho 189, 194, 288 P. 421, 422 (1930).

See also Albrethson v. Carey Valley Reservoir Company, 67 Idaho 529, 186 P. 2d 853 (1947); *Munn v. Twin Falls Canal Company*, 43Idaho 198, 252 P. 865 (1926); *Nampa & Meridian Irrigation District v. Petrie*, 37 Idaho 45, 233 P. 531 (1923); *Burt v. Farmers Co-operative Irr. Co., Ltd.*, 30 Idaho 752, 168 P. 1078 (1917); *Stuart v. Noble Ditch Company*, 9 Idaho 765, 76 P. 255 (1904).

Accordingly, the landowners' claim against Utah Power, whether denominated strict liability, an action in trespass, or private nuisance, is not maintainable against Utah Power on the facts of this case in the absence of proof of negligence. The case of *Bradford v. Simpson*, 97 Idaho 188, 541 P.2d 612 (1975), cited and argued by the landowners, is inapposite, considering our conclusion that Utah Power's liability, if any, can be based only on negligence. In *Bradford* we reiterated the legal standard applicable to riparian landowners who obstruct the natural flow of a stream thereby causing damage to another riparian landowner. We further noted that "such obstructions have been characterized by the courts as continuing trespasses or nuisances." 97 Idaho at 192, 541 P.2d at 616. As discussed above, the legal standard elucidated in the *Campion* line of cases, including *Bradford*, does not apply under the factual scenario presently before us. Furthermore, our prior cases dealing with flooding from artificial water storage and diversion systems do not refer to trespass in the usual sense. Rather, our case law in this area refers to the concept of "trespass on the case," the common law description of an action based on *negligence* principles, and does not provide for absolute liability where, for instance, a reservoir operator non-negligently discharges water which causes flooding. *Verhayen v. Dewey*, 27 Idaho 1, 9, 146 P.1116, 1118 (1915) ("[T]he Nampa and Meridian Irrigation District would be liable if it had negligently emptied said reservoir and injured the property of the plaintiff."). *See also Munn v. Twin Falls Canal Company*, 43 Idaho 198, 252 P.2d 865 (1926) and *Boise Development Company, Ltd. v. Boise City*, 30 Idaho 675, 167 P.1032 (1917).

The landowners additionally rely on *Smith v. King Grazing Association*, 105 Idaho 644, 671 P.2d 1107 (Ct. App. 1983) to argue that a cause of action in private nuisance could be maintained

against Utah Power. Again we disagree. In *Smith*, the Court of Appeals noted that "courts generally have not applied the sweeping principle of nuisance law to surface water cases." 105 Idaho at 646, 671 P.2d at 1109. In any event, the *Smith* court held that an upper landowner may alter the flow in a natural watercourse "so long as it remains within the watercourse." 105 Idaho at 647, 671 P.2d at 1110. Under this analysis, Utah Power acted within its legal rights by discharging stored water within the natural watercourse of the Bear River.

Accordingly, we hold that under Idaho law the answer to each of the three certified questions, *ante* at 2, is: No.

Costs, is any, on appeal to be fixed by the United States Court of Appeals.

JOHNSON and McDEVITT, JJ., and SCHROEDER, J. pro tem., concur.

BISTLINE, Justice dissenting.

* * *

(Counsel's Note: dissenting opinion dissenting opinion omitted due to length)

Opinion of the United States Court of Appeal

for the Ninth Circuit

(Interlocutory opinion certifying questions)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WAYNE KUNZ; OLIVE KUNZ; GLENN V. TURNER; CAROL TURNER, *Plaintiffs-Appellants,* v. UTAH POWER & LIGHT COMPANY, *Defendant-Appellee.*	No. 87-4361 D.C. No. CV-84-4085-MJC ORDER

Filed March 22, 1989

Before: Otto R. Skopil, Jr., Dorothy W. Nelson and Melvin Brunetti, Circuit Judges.

SUMMARY

Torts

Certifying several questions of law to the Idaho Supreme Court, the court found that it was unable to determine whether, under Idaho law, an action may be maintained pursuant to strict liability, direct trespass, or private nuisance theories for damages caused by intentional discharge of stored water.

Appellee Utah Power operates a water storage system used for irrigation and production of hydroelectric power. It is required to use the system for flood control. The storage capacity of a lake is regulated by adjusting its elevation. Appellant Kunz is one of several lower riparian landowners who own or lease lands and a private irrigation company on a river below the lake. Heavy runoffs were transferred into the

system by Utah Power, causing flooding of the landowners' properties. They sued for damages on negligence, liability, trespass and private nuisance theories. The district court dismissed all but the negligence causes, and the jury found for the power company on that theory. Motions for judgment n.o.v. and for a new trial were denied.

[1] Two different lines of cases have come down from the Idaho Supreme Court that apply different standards of liability under facts similar to those in this case. One line requires a showing of negligence for damages caused by water "artificially" brought upon the plaintiff's land. [2] A second line does not require proof of negligence. [3] As for direct trespass and private nuisance theories, the Idaho Supreme Court has not addressed either theory in the context of stored water.

ORDER

Various landowners ("Landowners") brought suit against the Utah Power & Light Company ("Utah Power") for damages to real and personal property caused by flooding waters that were discharged from a lake used as a water storage system by Utah Power. The district court dismissed all of the Landowners' theories of liability except for the negligence theory. In a special verdict, the jury found that Utah Power was not negligent and the court entered judgment for Utah Power. On appeal, Landowners contend that the court below erred in dismissing its alternative theories of liability. We certify several questions to the Idaho Supreme Court because we are unable to determine if, under Idaho law, an action may be maintained pursuant to strict liability, direct trespass, or private nuisance theories for damages caused by the intentional discharge of stored water.

BACKGROUND

In *Kunz v. Utah Power & Light Co.*, 526 F.2d 500 (9th Cir. 1975) ("*Kunz I*"), we described the structure and operation of

the identical river system involved here. We borrow extensively from that description.

Bear Lake lies on the border between Idaho and Utah. Bear River begins high in the Uinta Mountains of Utah, meanders back and forth between Utah and Wyoming, flows north some distance into Idaho, and finally turns back south into Utah, where it terminates in the Great Salt Lake. Bear River does not naturally enter Bear Lake; instead it flows past it a few miles to the north. In about 1917, however, the predecessor of Utah Power constructed Stewart Dam on the river, diverting the river's flow southward via canals into Mud Lake, which connects with Bear Lake. Bear Lake is thereby utilized as a reservoir. After the water reaches Bear Lake, it flows northward out of the lake, by gravity or through pumping, via an outlet canal to rejoin the old natural bed of Bear River some distance north of Stewart Dam. Between certain maximum and minimum limits (the height of the release gates and the depth of the pumping intake facilities), Utah Power can control the flow out of Bear Lake, and it can close the lake so that the flow continues directly down the river. The use of Bear Lake for water storage is the central feature of the whole system. The dam, canals, and the control facilities are located within Idaho.

Utah Power operates the system under the authority of various federal statutes, a court decree, and the Bear River Commission (established by the Bear River Compact, a joint effort of Idaho, Utah, and Wyoming). The explicit purposes for which Utah Power is commissioned to operate the system are (1) to store water for irrigation throughout the valley in Idaho and Utah below the Bear Lake facilities and (2) to generate hydroelectric power. In addition, as *Kunz I* conclusively established, Utah Power is required to use the facilities for flood control, particularly as to the spring runoffs of the watershed. Flood control is not one of the specified purposes imposed by the authorizations but is imposed by common-law negligence principles. *See generally Kunz*, 526 F.2d at

502-04. Additionally, the Bear River Compact establishes a minimum irrigation reserve level requirement. Under the dictates of the compact, Bear Lake must be maintained at an elevation of 5914.61'.

Utah Power regulates the storage capacity of Bear Lake by adjusting the lake's elevation. The key period is spring because during that period the runoffs cause a substantial rise in the lake's elevation. The full capacity level of the lake is 5923.65'. In regulating the lake elevation Utah Power balances the competing factors, including, irrigation, flood control, fish and wildlife, recreation, and power generation.

Landowners are numerous farmers who own or lease riparian lands, and a private irrigation company, located along the Bear River below Bear Lake. Prior to 1917 much of these lands were devoted to orchard grasses and wild hays, which were dependent upon flooding from the natural spring runoffs to maintain their growth. The installation of the water storage system in 1917 harnessed the spring runoffs and stopped the flooding, so the ranchers converted their operations to alfalfa and cereal crops, which will not tolerate floods.

During the period between 1983-1986, the spring runoffs were unusually heavy. During this period, Landowners' lands were flooded by stored and naturally flowing waters which were respectively discharged and "bypassed" by Utah Power from Bear Lake into the natural channel of Bear River in amounts exceeding the carrying capacity of the natural channel.

The Landowners filed an amended complaint seeking damages pursuant to a negligence theory and, alternatively, pursuant to a strict liability theory based on the *Fletcher v. Rylands* case, a direct trespass theory, or a private nuisance theory. The liability and damages issues were bifurcated. The Landowners moved for summary judgment on the liability issue.

The court below, in a memorandum decision *sua sponte* dismissed all of the theories of liability, except negligence, for failure to state a cause of action recognized by Idaho law. In a special verdict, a jury found Utah Power not negligent. The court entered judgment for Utah Power thereon. Landowners moved for a judgment notwithstanding the verdict, or, alternatively, for a new trial. Both motions were denied. Landowners timely appealed.

DISCUSSION

We review de novo the lower court's construction of Idaho law. *In re McLinn*, 739 F.2d 1395, 1403 (9th Cir. 1984) (en banc). We must determine whether the district court erred in holding that Idaho law does not recognize Landowners' alternative theories of liability in cases like the one presented here.

[1] Two different lines of cases have come down from the Idaho Supreme Court that apply different liability standards under facts similar to our case. One line of cases requires a showing of negligence to hold a party liable for damages resulting from the escape, seepage, or percolation of water that was "artificially" brought upon that party's land. *See, e.g., Stephenson v. Pioneer Irrig. Dist.*, 49 Idaho 189, 288 P. 421 (1930); and *Burt v. Farmer's Co-Op. Irrig. Co.*, 30 Idaho 752, 168 P. 1078 (1917). In *Stephenson* and *Burt* the Idaho Supreme Court stated:

> Under the common law one who diverted water from its natural course did so at his peril, and was held practically to be an insurer against damage which might result from such action. *Fletcher v. Rylands*, L. R. 1 Exch. 265, affirmed L. R. 3 H. L. 330 .... The common law has been modified and relaxed in this and other arid states, so that the owner of an irrigation ditch is only liable for damages occurring to others as a result of his negligence

> or unskillfulness in constructing, maintaining, or operating the ditch.

Burt, 168 P. at 1082 (citations omitted), *quoted in Stephenson*, 288 P. at 422.

[2] Another line of cases holds that a riparian owner of lands abutting a stream who obstructs or diverts the stream and causes damages to a riparian owner on the opposite side or to owners on land abutting above or below the stream are liable without proof of negligence. *See, e.g., Campion v. Simpson*, 104 Idaho 413, 659 P.2d 766, 768 (1983); *Milbert v. Carl Carbon, Inc.*, 89 Idaho 471, 406 P.2d 113, 117 (1965); and *Fischer v. Davis*, 19 Idaho 493, 116 P. 412, 413 (1911). In *Campion v. Simpson*, the court characterized as wrongful *per se* the obstruction of a stream system which partially blocks the stream and diverts the waters against another causing damage thereto. *Campion*, 659 P.2d at 768.

[3] As for the direct trespass and private nuisance theories, the Idaho Supreme Court has yet to address either theory in the context of discharge of stored water. Therefore, we seek the court's guidance on this matter. Despite counsel's diligence in researching and arguing relevant cases, we are unable to discern how Idaho courts would decide several important issues. As required by Idaho Appellate Rule 12.1 we find that there is no controlling precedent on these issues and that an immediate determination of these issues "would materially advance the orderly resolution" of Landowners' appeal.

We certify the following questions to the Idaho Supreme Court:

(1) Under Idaho law, may one be held liable without proof of fault for damages caused by the intentional discharge of water?

(2) Under Idaho law, may one be held liable pursuant to a direct trespass theory for damages caused by the intentional discharge of water?

(3) Under Idaho law, may one be held liable pursuant to a private nuisance theory for damages caused by the intentional, but nonnegligent, discharge of water?

We respectfully request the Idaho Supreme Court to exercise its discretionary authority under Idaho Appellate Rule 12-1(c) to accept and decide these questions. Our phrasing of the questions should not restrict the court's consideration of the problems and issues involved. "The court may reformulate the relevant state law questions as it perceives them to be, in light of the contentions of the parties." *Toner v. Lederle Laboratories*, 779 F.2d 1429, 1433 (9th Cir. 1986); *accord Meckert v. Transamerica Ins. Co.*, 742 F.2d 505, 507 (9th Cir. 1984). If the Idaho Supreme Court deems the issues presented by this case to be inappropriate for certification, or if it chooses to decline the certification for any other reason, it should so state, and we will resolve the issues according to our perception of Idaho law.

The Clerk will file a certified copy of our Order with the Idaho Supreme Court under Idaho Appellate Rule 12.1(b). This panel retains jurisdiction over further proceedings in this court. The parties will notify the Clerk within one week after the Idaho Supreme Court accepts or rejects certification, and again within one week after that court renders its opinion.

So ordered.

Opinion of the District Court of the

United States for the District of Idaho

1920 "Dietrich Decree" excerpts

Plaintiff's Exhibit No. 12

In the District Court of the United States for the
District of Idaho, Eastern Division.

Utah Power & Light Company

Plaintiff,

v.

The Last Chance Canal Company,
Limited, et. al.

Defendants.

In Equity No. 203

FINAL DECREE

Before HON. F.S. DIETRICH,
District Judge.

Filed July 14, 1920.

W.D. McREYNOLDS,
Clerk.

By PEARL ZANGER,
Deputy,

This case came on to be further heard at this term, additional proof being submitted and the cause further argued by counsel, and thereupon, upon consideration thereof, it is ORDERED, ADJUDGED AND DECREED as follows, viz:

I.

1. That the Bear River is an inter-state stream with a large number of tributaries in the State of Utah, Wyoming and Idaho, said river rising in the Wasatch mountains in northeastern Utah and flowing in a general northerly direction through the States of Utah and Wyoming to a point on the boundary line between the States of Idaho and Wyoming near the town of Border in the State of Wyoming, into the State of Idaho, thence in a general northwesterly direction around the north end of Bear Lake (including North or Mud Lake) located in Bear Lake County, Idaho, and Rich County, Utah, to a point near the town of Alexander in said State of Idaho, thence in a general southerly direction through the States of Idaho and Utah, emptying into Great Salt Lake in said latter state.

That there is hereby drawn within the jurisdiction of this court, for distribution for beneficial uses, under and pursuant to the terms of this decree, all that portion of Bear River, as above described, commencing at a point directly north of Bear Lake in Section 34, Township 13 South, Range 44 East, Boise Meridian, which said point is marked and indicated by the "Stewart Dam," and headgates to the plaintiff's intake canal into Bear Lake Reservoir, known as the "Rainbow Canal," thence generally northwesterly through Idaho, to a point near the town of Alexander. thence in a general southerly direction to the boundary line between the States of Idaho and Utah, together with all intervening tributaries of the Bear River, which are decreed to constitute a single inter-dependent river system, to be administered under the terms of this decree.

2. Subject to the prior rights of the various defendants, as hereinafter decreed in the order of their respective priorities, the said plaintiff, the Utah Power & Light Company, has the right to divert at the Stewart Dam, as hereinbefore described, (and also in seasons

of flood water through the "Dingle Inlet Canal" diverting from Bear River in the Northwest quarter of Section 17, Township 14 South, Range 45 East, Boise Meridian) and to impound and store in the Bear Lake Reservoir, consisting of Bear Lake and Mud or North Lake, in Rich County, Utah, and Bear Lake County, Idaho, all of the waters of Bear River to the extent of 5500 cubic feet per second of time, together with the waters naturally flowing into or arising in said lakes, all said waters to be stored in said Reservoir, and to be thereafter released from said reservoir at the said plaintiff's pleasure, through the plaintiff's embankment or "dyke" located within the lake meander lines, and extending from Section 16 to Section 18, in Township 14 South, Range 44 East, Boise Meridian, by means of control works locate therein at a point approximately North 64° 13' East 8120 feet from the Southwest corner of Section 18, Township 14, South, Range 44 East, Boise Meridian, and to be thence conveyed through the plaintiff's outlet canal, extending generally northwardly from the said control works to a confluence with Bear River, near the center of Section 6, Township 13 South, Range 44 East, Boise Meridian, and thence down the natural channel of Bear River, for use at various points of diversion now existing, or which may hereafter be established by the plaintiff for the generation of electric power, and for such irrigation or other beneficial purposes, recognized by law, as the plaintiff may devote or dedicate said released stored waters, by use, sale, rental, or otherwise.

In its exercise herein defined, the plaintiff may, to the extent of its various appropriations, divert and impound in storage, the waters of Bear River and of Bear Lake at all times, and at all seasons of the year, when by so doing it does not interfere with the exercise of any prior rights fixed by this decree, and the waters released by it from storage may be conveyed through the natural channel of the river, and shall be protected under the provisions of this decree for the distribution designated by the plaintiff, as though kept and conveyed within an artificial channel, and the return of the waters to the river, after their various used by the plaintiff, shall not be deemed an abandonment thereof, but it is recognized by this decree, and it shall

be recognized by the officers charged with the administration hereof, that the plaintiff's rights in said waters continue throughout the portion of the stream brought under this decree for use both in Idaho and beyond the Utah-Idaho state line, and all parties to this suit, their heirs, executors, administrators, successors in interest and assigns, and the agents, servants and attorneys of said parties, their heirs, etc., are hereby perpetually enjoined and restrained from in any manner using or interfering with the use by the plaintiff of the said released stored waters, except with the consent and under the authority of the plaintiff, its successors or assigns.

In administering the rights of the plaintiff herein decreed and mentioned, the following considerations shall be observed and recognized:

* * *

Kunz et al. Second Amended Complaint (excerpts)

IN THE DISTRICT COURT OF THE UNITED STATES

DISTRICT OF IDAHO

WAYNE and OLIVE KUNZ, husband and wife,; DAVID H. JENSEN, DON W. JENSEN and NEIL B. JENSEN, d/b/a JENSEN RANCH AND DAIRY; LEON and ALICE HARDCASTLE, husband and wife; FRED WELLS; LYNN WELLS; GLEN and JUDY GRUNIG, husband and wife; LARRY and CAROLYN ALLEMAN, husband and wife; MONTPELIER IRRIGATION CO., and Idaho corporation; GARY THOMPSON; LYLE STEPHENS; REX LINFORD, JOHN K. IPSEN; DAN STEWART; and FRED HUNZEKER,

Plaintiffs,

v.

UTAH POWER & LIGHT CO., a foreign corporation,

Defendant.

COME NOW Plaintiffs, and for their cause of action against Defendant, Utah Power & Light Company, allege as follows:

1.

That Plaintiffs are now and were at all time mentioned herein residents of the State of Idaho.

2.

That defendant Utah Power & Light Company is a Utah corporation, duly qualified to conduct business under the laws of the State of Idaho as a foreign corporation, with its principal place of business in Salt Lake City, Utah.

3.

That original jurisdiction exists in this Court under 28 U.S.C. § 1332 since there exists complete diversity of citizenship and the amount in controversy exceeds the sum of $10,000 as to each Plaintiff, exclusive of interest and costs.

FIRST CAUSE OF ACTION

4.

That Plaintiffs are now and were at all time mentioned herein the owners of or lessees of certain farm lands adjacent to and/or subject to flooding by the Bear River between Bear Lake and Soda Reservoir in the counties of Franklin and Caribou, Idaho.

5.

That at all times mentioned herein, and continuously since approximately 1917, Defendant Utah Power & Light Company has owned, operated, and maintained a system of dams, reservoirs, and hydro-electric generation facilities on Bear River and utilized certain water rights decreed in the so-called *Dietrich Decree* in Idaho [*Utah Power & Light Co. v. Last Chance Canal Company, in Equity No. 203, , entered July 14, 1920] and "Kimball* Decree *(Utah Power & Light Co. v. Richmond Irrigation Company,* Utah No. 1772, entered February 21, 1922].

6.

That pursuant to said *Dietrich* and *Kimball* decrees, Defendant Utah Power & Light Company is entitled to impound and store water in Bear Lake and release the same down the natural channel of Bear River for the generation of electric power and for irrigation purposes.

7.

That defendant Utah Power & Light Company has further voluntarily undertaken flood control efforts in its operation of the Bear River/Lake water storage system.

8.

That said operation of the Bear River/Lake water storage system by Defendant has materially altered that natural water flow in the area by regularly storing and releasing the annual spring runoff.

9.

That Defendant Utah Power & Light Company does not have any grant, right, or easement for the flooding of Plaintiff's lands adjacent to the Bear River by virtue of the *Dietrich Decree* or otherwise.

10.

That Defendant Utah Power & Light Company has the responsibility for avoiding damaging floods and owes the duty of reasonable care and flood control to Plaintiffs/

11.

That the carrying capacity of the natural Bear River channel in the vicinity of the Plaintiff's farmland has been gradually reduced by deposits of sediment in the bed of the river caused by the existence of said dams and reservoirs along the river, the absence of scouring effect of high spring runoff and flooding, and the rapid raising and lowering of the flood levels on a frequent basis for the purpose of maximizing power generation during peak load, causing unnatural and excessive erosion of the riverbanks.

12.

That Defendant, in the operation of its power generation facilities on Bear River, has caused and continues to cause the flow levels of the river to be rapidly raised and lowered on a frequent basis for the purpose of maximizing power generators during peak loads. Said low fluctuations have caused unnatural, excessive, and continuous erosion and deterioration of the riverbanks, resulting in a taking of Plaintiff's lands by Defendant without compensation for which Defendant is liable to Plaintiffs.

13.

That commencing on or about June 6, 1983, after peak spring runoff subsided and Plaintiffs have undertaken to plant, raise, and harvest crops upon their land, Plaintiffs' lands were continously flooded until approximately February, 1984, as a direct and proximate result of the operation of the Bear Lake/River water storage system by Defendant, as a result of which Plaintiffs have suffered damage to their crops, real property, and other facilities and other general and consequential damages in excess of $920,000. That the full extent of Plaintiffs' damages has not been ascertained and Plaintiffs reserve the right to amend their Complain to assert their claims for additional damages according to proof at the time of trial. Additionally, should Plaintiffs' lands be further flooded in the period between the time of the filing of this Complaint and the trial

of this action, Plaintiffs reserve the right to further amend their Complaint in regard thereto.

14.

That Defendant Utah Power & Light Company is strictly liable to Plaintiffs for damages caused by the flooding and erosion of their lands, which liability has been heretofore established in the cases of *Kunz v. Utah Power & Light Co.*, 326 F.2d 500 (9th Cir. 1975), and Gosner v. Utah Power & Light Co., 612 P.2d 337 (Utah 1980).

* * *

WHEREFORE, Plaintiffs pray for judgement against Defendant as follows:

1. For damages sustained in 1983 by Plaintiffs Wayne and Olive Kunz, the sum of $233,893.21.

2. For damages sustained in 1983 by Plaintiffs David H. Jensen, Don W. Jensen and Neil B. Jensen,m the sum of $12,869.

3. For damages sustained in 1983 by Plaintiffs Leon and Alice Hardcastle, the sum of $32,100.

4. For damages sustained in 1983 by Plaintiffs Lynn Wells and Fred Wells, the sum of $31,254.

5. For damages sustained in 1983 by Plaintiffs Glen and Judy Grunig, the sum of $29,352.

6. For damages sustained in 1983 by Plaintiffs Larry and Carol Alleman, the sum of $74,000.

7. For damages sustained in 1983 by Plaintiff Montpelier Irrigation Co., an Idaho corporation, and amount to be proven at trial.

8. For damages sustained i 1983 by Plaintiff Gary Thompson, the sum of $32,854.

9. For damages sustained in 1983 by Plaintiff Lyle Stephens, the sum of $19,769. 03.

10. For damages sustained in 1983 by Plaintiff Rex Linford, in excess of $10,000, or other amount to be proven at trial.

11. For damages sustained in 1983 by Plaintiff John D. Ipsen, the sum of $22,050.

12. For damages sustained in 1983 by Plaintiff Dan Stewart, an amount to be proven at trial.

13. For damages sustained in 1983 by Plaintiff Fred Hunzeker, the sum of $37,190.

14. For damages sustained in 1984 by Plaintiff Wayne and Olive Kunz, in the sum of $233,893.21.

15. For damages sustained in 1984 by Plaintiff Leon and Alice Hardcastle, in the sum of $32,100.

16. For damages sustained in 1984 by Plaintiff Larry and Carolyn Alleman, the sum of $74,000.

17. For damages sustained in 1984 by Plaintiff Gary Thompson, the sum of $32,854.

18. For damages sustained in 1984 by Plaintiff Lyle Stephens, the sum of $19,769.03.

19. For damages sustained in 1984 by Plaintiff John. D. Ipsen, the sum of $22,050.

20. For damages sustained by Plaintiff Viking Ranch in the year 1983 through 1984 in a sum in excess of $10,000.

21. For punitive damages in such amount as is just and reasonable.

22. For reasonable attorney fees and Court costs.

23. For such other and further relief as this Court deems just and equitable under the premises.

PLAINTIFFS DEMAND A TRIAL BY JURY ON ALL ISSUES DATED this 21st day of October, 1985.

* * *

Turner et al. Amended Complaint (Excerpts)

IN THE UNITED STATES DISTRICT COURT IN THE FOR THE DISTRICT OF IDAHO

GLENN V. TURNER and CAROL TURNER, husband and wife; RONALD K. PANTER and BARBARA PANTER, husband and wife, LYMAN ANDERSON and DARLA ANDERSON, husband and wife, KIETH BARTHLOME and PHYLIS BARTHLOME, husband and wife, DEAN BURTON and LOIS BURTON, husband and wife; CRAIG ELSMORE and LYNN ESMORE, husband and wife; JIM W. ELSMORE and COY ELSMORE, husband and wife; KIMBALL EVANS and PATSIE EVANS, husband and wife; MICHAEL C. HARRIS and NAN HARRIS, husband and wife; ALLAN R. HORSLEY and HELEN HORSLEY, husband and wife; C. ROBERT McGREGOR and RELDA McGREGOR, husband and wife; DWAYNE MENDENHALL and ANN MENDENHALL, husband and wife; LAWRENCE D. MICKELSON and LINDA MICKELSON, husband and wife; RILEY L. MICKELSON and BARBARA T. MICKELSON, husband and wife; RAYMOND OSTLER and VONEAL OSTLER, husband and wife; RANDY PANTER and TRINA PANTER, husband and wife; DEL W. SMITH and CARMEN SMITH, husband and wife; HARRRIS STEPHENSON and RUTH M. STEPHENSON, husband and wife; and GLADYS R. WILLIAMS, a widow Plaintiffs, vs. UTAH POWER & LIGHT COMPANY, a Main Corporation,	)))))))Case No. 84-4163))))))) AMENDED)COMPLAINT DEMAND) FOR JURY TRIAL)

COMES NOW Plaintiffs and for their cause of action against Defendant Utah Power & Light Company, allege as follows:

1. That Plaintiffs are now and were at all times mentioned herein residents of the State of Idaho.

2. That Defendant Utah Power & Light Company is a Corporation, duly qualified to conduct business under the laws of the State of Idaho as a foreign corporation, with it's principal place of business in Salt Lake City, Utah.

3. That original jurisdiction exists in this Court pursuant to Title 28, U.S.C. §1332 since there exists complete diversity of citizenship and the amount in controversy exceeds the sum of $10,000 as to each Plaintiff, exclusive of interest and costs.

FIRST CAUSE OF ACTION

1. That Plaintiffs are now and were at all times mentioned herein the owners of certain farm lands adjacent to and/or subject to flooding by the Bear River below the Grace Dam and above the Oneida Dam in the Counties of Franklin and Caribou, State of Idaho, excepting Plaintiffs Dean Burton and Craig Elsmore who are the respective Lessees of the real property owned by Plaintiff Del W. Smith and Jim W. Elsmore. Said real properties, together with the acres flooded, are described in Exhibit "A" attached hereto and incorporated by reference.

2. That at all times mentioned herein, and continously since approximately 1917, Defendant Utah Power & Light Company has owned, operated and maintained a system of dams, reservoirs, hydro electric generation facilities, on Bear River and utilized certain water rights decreed in the so called *Dietrich Decree* in Idaho (*Utah Power & Light Company vs. Last Chance Canal Company*, et al., In Equity #203 entered July 14, 1920) and *Kimball Decree* in Utah (*Utah Power & Light*

Company vs. Richmond Irrigation Company, et al., Utah #1772 entered February 21, 1922).

3. That pursuant to said *Dietrich* and *Kimball* Decrees, Defendant Utah Power & Light Company is entitled to impound and store water in Bear Lake and release the same, at it's pleasure, down the natural channel of Bear River for the generation of electric power and for irrigation purposes.

That Defendant Utah Power & Light Company has further voluntarily undertaken flood control efforts in it's operation of the Bear River/Bear Lake water storage system.

4. That said operation of the Bear River/Bear Lake water storage system by Defendant has materially altered the water flow patterns in the area by regularly storing and releasing the annual spring runoffs.

5. That Defendant Utah Power & Light Company does not have any grant, right or easement for the flooding of Plaintiffs' lands adjacent to the Bear River by virtue of the "Dietrich Decree" or otherwise.

6. That Defendant Utah Power & Light Company has a responsibility for avoiding damaging floods and owes a duty of care and flood control to Plaintiffs.

7. That the carrying capacity of the natural Bear River channel in the vicinity of the Plaintiffs' farm land has been gradually reduced by deposits of sediment in the bed of the river caused by the existence of said dams and reservoirs along the river, the absence of scouring effect of high Spring runoff and flooding, and the rapid raising and lowering of the flow levels on a frequent basis for the purpose of maximizing power generation during peak loads causing unnatural and excessive erosion of the river banks below the Grace Power Plant.

8. That Defendant, in the operation of it's power generation facilities on Bear River, and particularly the Grace Power Plant located immediately above Plaintiffs' lands has caused, and continues to cause the flow levels of the river to be rapidly raised and lowered on a frequent basis for the purpose of maximizing power generation during peak loads. Said flow fluxuations have caused unnatural, excessive and continuous erosion and deterioration of the river banks resulting in a taking of Plaintiffs' lands by Defendant without compensation for which Defendant is liable to Plaintiffs.

9. That commencing on or about June 6, 1983, after peak Spring runoff subsided and Plaintiffs had undertaken to plant, rear and harvest crops upon their land, Plaintiffs' lands were continuously flooded until approximately February, 1984, as a direct and proximate result of the operation of the Bear Lake / Bear River water storage system by Defendant as a result of which Plaintiffs have suffered damage to their crops, real property and other facilities and other general and consequential damages in the approximate sum of $850,000.00. That the full extent of Plaintiffs' damages has not been ascertained and Plaintiffs' reserve the right to amend their Complaint to assert their claims for additional damages according to proof at the time of trial. Additionally, should Plaintiffs' lands be further flooded in the period between the time of the filing of this Complaint and the trial of this action, Plaintiffs reserve the right to further amend their Complaint in regard thereto.

* * *

WHEREFORE, Plaintiffs pray Judgment against Defendant Utah Power & Light Company as follows:

A. For damage to Plaintiffs' crops, real property and facilities for flooding from June 14, 1983, through 1984 in the sum of $850,000.00, together with such additional damages according to proof at the time of trial, the exact amount of which is uncertain and unascertainable at this time.

B. For damages to Plaintiffs' crops, real property and facilities which may occur as a result of flooding by Defendant subsequent to the date of the filing of this Amended Complaint up to the time of trial.

C. For punitive damages in such amount as is just and reasonable.

D. For reasonable attorney fees and costs necessarily incurred herein and for such other and further relief as the Court deems just and equitable under the circumstances.

PLAINTIFFS HEREBY DEMAND TRIAL BY JURY

DATED this 20th day of November , 1985.

* * *

EXHIBIT "A"

1. GLENN V. TURNER:
   Township 11 South, Range 40 East,
   B.M., Caribou County, Idaho:

   Section 25: Part of the S1/2 NW1/4 and the N1/2 SW1/4 lying each of the center line of Bear River. (66 acres)

   Township 11 South, Range 41 East,
   B.M., Caribou County, Idaho:

   Section 36: North half of N1/2 NE1/4 lying east of Bear Rive . (20.6 acres)

   TOTAL ACRES FLOODED: 87.2 (Barley)

2. RONALD K. PANTER:
   Township 11 South, Range 41 East,
   B.M., Franklin County, Idaho:

   Section 24:

   TOTAL ACRES FLOODED: 20.2 (Alfalfa)
   11.8 (Barley)
   32.0

3. LYMAN K. ANDERSON:
   Township 11 South, Range 40 East,
   B.M., Caribou County, Idaho:

   Section 35: SE1/4
   Section 36: SW1/4

   TOTAL ACRES FLOODED:

   5.5 (Alfalfa)
   7.0 (Meadow Hay)
   23.0 (Barley)
   8.0 (Grazing)
   43.5

6. CRAIG ELSMORE (Lessee), JIM W. ELSMORE (Owner):
   Town ship 11 South, Range 40 East.
   B.M., Caribou County, Idaho

Section 25:

TOTAL ACRES FLOODED:	2.0	(Meadow Hay)
	24.6	(Barley)
	26.6	

7. KIMBALL EVANS:
Township 11 South, Range 40 East,
B.M., Caribou County, Idaho:

Section 25:

TOTAL ACRES FLOODED:	19.8	(Meadow Hay)
	13.6	(Barley)
	33.4	

8. MICHAEL C. HARRIS:
Township 11 South, Range 40 East,
B.M., Caribou County, Idaho

Section 23:

Section 24:

TOTAL ACRES FLOODED:	14.6	(Barley)

9. ALLAN R. HORSLEY;
Township 12 South, Range 41 East,
B.M., Franklin County, Idaho:

Section 24: South half of NE1/4, NW1/4 of SE1/4, NE1/4 of SE1/4, SW1/4 of SE1/4, NE1/4 of SW1/4, SE1/4 of SW1/4.

TOTAL ACRES FLOODED:	7.0	(Alfalfa)
	15.0	(Meadow Hay)
	18.0	(Pasture)
	40.0	

10. C. ROBERT McGREGOR:
Township 12 South, Range 41 East,
B.M., Franklin County, Idaho:

Section 30: NE1/4 of SW1/4 (containing 24 acres) and NE corner of SW1/4 (containing 24 acres).

TOTAL ACRES FLOODED: 5.0 (Meadow Hay)
8.0 (Pasture)
13.0

11. DWAYNE MENDENHALL:
Township 11 South, Range 40 East,
B.M., Franklin County, Idaho:

Section 36: N1/2 SE1/4, SE1/4, SE1/4, E1/2, SW1/4SE1/4, S1/2NE1/4

TOTAL ACRES FLOODED: 49.0 (Meadow Hay)
50.0 (Barley)
99.0

12. LAWRENCE D. MICKELSON:
Township 11 South, Range 40 East,
B.M., Caribou County, Idaho:

Section 25: NW1/4, NE1/4, NW1/4

Section 24: E1/2 SE1/4, SE1/4, SW1/4

TOTAL ACRES FLOODED: 60 (Alfalfa)
51 (Barley)
111

14. RAYMOND OSTLER:
Township 12 South, Range 40 East,
B.M., Franklin County, Idaho:

Section 1:

TOTAL ACRES FLOODED: 30.0 (Alfalfa)
23.0 (Pasture)
53.0

15. RANDY PANTER:
Township 12 South, Range 40 East,
B.M., Franklin County, Idaho:

Section 24: NE1/4, NW1/4, NW1/4, NE1/4

TOTAL ACRES FLOODED: 26.0 (Barley)

16. HARRIS STEPHENSON:
Township 12 South, Range 40 East,
B.M., Franklin County, Idaho:

Section 1: N1/2 of NW1/4

TOTAL ACRES FLOODED: 26.0 (Seeded Pasture)

17. GLADYS R. WILLIAMS:
Township 12 South, Range 41 East,
B.M., Franklin County, Idaho:

Section 19: NW1/4 SW1/4, SW1/4 SW1/4

TOTAL ACRES FLOODED: 40.0 (Meadow Hay)

SUMMARY OF TOTAL ACRES FLOODED

348.1-----Barley
232.8-----Alfalfa
161.3-----Meadow Hay
100.0-----Pasture

842.2 TOTAL

Petitioners' Briefs

Raising Constitutional Claims filed

in Ninth Circuit and Idaho Supreme Court

(material excerpts)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-4361

WAYNE KUNZ, ET AL., AND GLENN V. TUNER, ET AL.

Appellants,

vs.

UTAH POWER & LIGHT COMPANY

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Honorable Marion J. Callister,
Chief Judge, Presiding

APPELLANTS' REPLY BRIEF

Louis F. Racine, Jr.
Randall C. Budge
John R. Goodell
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* * *

E. LANDOWNERS' PROPERTY RIGHTS UNDER IDAHO WATERCOURSE LAW CANNOT BE SUPPLANTED BY ALLEGED GRATUITOUSLY AND SUBSEQUENTLY ASSUMED "DUTIES" ON ENVIRONMENTAL MATTERS OWING THIRD PARTIES OR THE GENERAL PUBLIC.

In a nutshell, Utah Power contends that it is entitled to "play God" and strike a so-called "balance" between competing countervailing legal duties or interests of flood control, power generation, irrigation, fish and wildlife, and recreation. The argument is based upon the general proposition that, since it owes a duty to "all persons and interests." whatever they be, it may selectively determine whom to harm and whom to benefit through the intentional and deliberate operation of its artificial works which have totally changed above these Landowner' lands the natural drainage of the river system.

The Landowners' constitutionally-protected private property rights and well-settled Idaho watercourse law do not allow Utah Power to so act. Utah Power and the jury are not free to single out the destruction or wrongful taking the Landowners' farmlands and private property rights, *without compensation*, for the benefit of other classes of person or interests. Fundamental notions of due process and the integrity of private property ownership force rejection of Utah Power's argument. Utah Power possesses the power of eminent domain and may condemn private property for such public use if it deems it necessary. *See*, Idaho Constitution, Article 1, § 14; I.C. § 7-701, *et seq; Washington Water Power Company v. Waters*, 19 Idaho 595, 115 P. 682 (1911). However, Utah Power cannot, consistently with due process, constructively evict or deprive the Landowners of the lawful use and enjoyment of their own lands without payment of just compensation, and cannot

be allowed to repeatedly flood lands for extended periods with impunity. Utah Power cannot do so in furtherance of its own business purposes of hydropower generation or selling unappropriated excess irrigation water. Nor can fish and wildlife, recreation, or third party interests *gratuitously and subsequently assumed*, if indeed such conduct has ripened into any arguable legal duty, which is far from established by the record other than by Utah Power's own self-serving assertion. It strains credulity to imagine that Utah Power would admit liability for damaging environmental concerns if sued by affected parties. No doubt it would argue such damage was necessary and legally justified because of its duty of flood control owing the Landowners. Utah Power's argument conveniently avoids all liability for damage it causes *all* persons to whom a duty is owing by playing one off against the other.

If, as asserted, Utah Power has created a situation where it is impossible in higher than average runoff years to avoid flooding the landowners, while also protecting countervailing environmental concerns it asserts it is charged with, so that it must elect one group to damage and one group to benefit, creating this "Hobbesian choice" it (sic) is attributable only to Utah Power's own voluntary conduct. Even assuming that his accurately depicts Utah Power's predicament, which the Landowners deny, it presents no legal excuse or justification to damage with impunity the Landowners' land an deprive them of its use. Utah Power can elect to pay periodic damage claims, negotiate a purchase of the property, or condemn it, buy flood easements, improve channel capacity, or take any number of other remedial actions -- some of which it *has* done, despite the Landowners having been precluded form so showing by the challenged evidentiary rulings.

Utah Power is not entitled to determine at its own arbitrary whim and caprice which class of person or interests to damage and which to benefit, without responsibility for compensating the persons damaged, where both categories possess recognized protectable private property rights. *Smith v. Big Lost River Irr. Dist.*, 83 Idaho 374, 382, 364 P.2d 146, 150-151 (1961), quoting

with approval 56 Am.Jur., *Waters*, § 14, p. 505 (quoted in the Opening Brief at 34).

The Landowners' private property rights have standing and are protected and recognized by *Kunz I*, the Compact, the Dietrich Decree, and Idaho watercourse law cited by Landowners. Disregard of those rights under the management by Utah Power and the verdict of the jury cannot properly stand.

* * *

IN THE SUPREME COURT OF THE STATE OF IDAHO

WAYNE KUNZ; OLIVE KUNZ; GLENN V. TURNER; CAROL TURNER,	)	Supreme Court No. 17893
	)	Civil No. 87-4361
Plaintiffs - Appellants,	)	
vs.	)	
UTAH POWER & LIGHT COMPANY	)	
	)	
Defendant - Respondent.	)	

APPELLANTS' OPENING BRIEF

Appeal by Certification from the
Court of Appeals for the Ninth Circuit

Befor Otto R. Skopil, Jr., Dorthy W. Nelson
and Melvin Brunetti, Circuit Judges

Louis F. Racine, Jr.
Randall C. Budge
John R. Goodell
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ATTORNEYS FOR
RESPONDENT

* * *

VI. THE LANDOWNER'S PRIVATE PROPERTY RIGHTS MAY NOT WRONGFULLY TAKEN WITHOUT JUST COMPENSATION IN ORDER TO NOT BE WRONGFULLY TAKEN WITHOUT JUST COMPENSATION IN ORDER TO FAVOR ANOTHER CLASS OF PERSONS WITH COMPETING RIGHTS OR INTERESTS.

Utah Power in effect contends it is entitled to determine and strike a "balance" between alleged competing "interests" of irrigation, hydropower generation, fish and wildlife, recreation, and flood control. Utah Power contends it has the right to do so within its sole discretion and wisdom. History demonstrates the Landowners can place little confidence in Utah Power's judgment or operational decisions. That history demonstrates, not surprisingly, that Utah Power operates the system in its self - interest by maintaining high lake levels with the resultant benefit of increased hydropower generation and increased water for irrigation, while sacrificing flood control to the Landowner's detriment.

The crux of Utah Power's argument, which this Court should reject, is premised on the proposition that Utah Power may choose which class of interest to harm and which to benefit through the management and operational decisions it makes in running Bear Lake-Bear River system. This proposition is emphatically contrary to Idaho law. The law regards Utah Power as merely one other appropriator, and the Landowner's property rights equally deserving of protection of law.

In *Smith v. Big Lost River Irrigation District*, 83 Idaho 374, 382, 364 P.2d 146, 150-51 (1961), this Court quoted with approval the following rule citing 56 Am. Jur. 505, Waters, §14:

> "It is established, however, that the ordinary or natural course of water cannot lawfully be changed for the benefit of one person or class of persons to the injury of another. Accordingly, one who changes the course of a stream

must do so in such manner as not to injure, or unduly interfere with the rights of the adjoining proprietor, either above or below, or on the opposite side of the stream. Thus, he must not, by changing the direction of the flow of the stream, so increase or diminish its velocity as to cause damage to the land of the adjoining proprietor, or impair his rightful use of the stream; not can he make any change or diversion of the stream, although on his own land, which would cause the washing of mud and debris on the land of his neighbor, to the injury of the later, and which would not have occurred had it not been for the change in the current stream." (Emphasis supplied.)

Accord: Teeter v. Nampa & Meridian Irrigation District, supra; Dayley v. City of Burley, supra; Merrill v. Penrod, supra.

Therefore, the downstream Landowners as a class cannot be sacrificed because Utah Power considers it "reasonable", or more desirable social or economic policy, to pursue the "other interests" (i.e., irrigation, hydropower generation, fish and wildlife, recreation) and maintain a high lake level and inadequate storage capacity to contain heavy spring runoff. Acceptance of Utah Power's argument in effect "balances away" the Landowners' property rights without just compensation.

Utah Power has recourse to the power of eminent domain and may condemn private property for public use if it deems such necessary to its operations. *Idaho Constitution*, Article 1, §14; I.C. §7-701, *et seq; Washington Water Power Company v. Waters*, 19 Idaho 595, 115 P. 682 (1911).

However, Utah Power cannot, consistent with due process, constructively evict or deprive the Landowners of the lawful use and enjoyment of their own lands without payment of just compensation, which is precisely the effect of repeatedly flooding such lands for extended periods with impunity. Utah Power has no right to do so in furtherance of its own business purposes of hydropower generation and selling unappropriated excess irrigation water; nor does it have the right to do so on the basis of arguable competing fish and wildlife, recreation, or other

unidentified "interests" gratuitously or subsequently assumed, if indeed it owes any such arguable legal duties. Moreover, Utah Power can point to no legal source imposing such duties other than its own self-serving assertion.

Any argument that Utah Power should not be held liable for flooding because of the "unusually" heavy spring runoff occurring in the years in question should be rejected. Variable weather conditions were foreseeable. *Wilson v. Boise City*, 6 Idaho 391, 397, 55 p. 887, 889 (1899). The Ninth Circuit in *Kunz I* rejected Utah Power's similar argument that "unprecedented" or "extraordinary" heavy spring runoffs did equate to an "unforeseeable" condition. *Kunz I, supra* at 504.

Simple operation consistent with the "minimum irrigation reserve" level prescribed by the Compact would provide ample storage for unusually heavy spring runoff at any historic level with a substantial margin of safety, and also allow Utah Power to perform all legal obligations owing other interests.

If Utah Power declines this method of operation, it should be answerable for the consequences and required to compensate the victims of its operational methods as a cost of doing business.

Utah Power can elect to pay periodic damage claims; negotiate a purchase of abutting real property; seek condemnation of the abutting property; buy or condemn flood easements; improve channel capacity by dikes, levies, or elimination of sedimentation. These ar just a few of the alternatives.

* * *

IN THE SUPREME COURT OF THE STATE OF IDAHO

WAYNE KUNZ; OLIVE KUNZ; GLENN V. TURNER; CAROL TURNER,	)	Supreme Court No. 17893
	)	Civil No. 87-4361
Plaintiffs - Appellants,	)	
vs.	)	
UTAH POWER & LIGHT COMPANY	)	
	)	
Defendant - Respondent.		

APPELLANTS' REPLY BRIEF

Appeal by Certification from the
Court of Appeals for the Ninth Circuit

Befor Otto R. Skopil, Jr., Dorthy W. Nelson
and Melvin Brunetti, Circuit Judges

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ATTORNEYS FOR
RESPONDENT

* * *

It is only just and reasonable that flooding losses from continuing excessive and intentional discharges, which overflow the natural channel of the bank, be absorbed by Utah Power as a cost of doing business. Such costs can easily be spread at a relatively *de minimis* per unit cost across Utah Power's rate base. Utah Power's rate paying customers and shareholders benefit from maintenance of high lake levels and increased hydropower production capacity and resulting increased profits.

Imposing this cost on the downstream riparian landowners whose lands are periodically flooded, depriving them of its use, destroying crops, washing away top soil, eroding riverbanks, and causing other damage, who have a right to live in peace and earn a livelihood without invasion or undue interference as a result of Utah Power's operations, is contrary to law and sound public policy,

Utah Power's purported justification taking or "balancing away" the Landowners' private property rights to benefit other groups of classes of citizens is bad law and bad policy. *Smith v. Big Lost River Irrigation District*, 83 Idaho 374, 382, 36 P.2d 146, 150-151 (1961); *see discussion*, Landowner's Opening Brief, Part IV, at 42-45.

Anything short of recognizing causes of action on the alternative theories which do not require proof of negligence, and failure to hold as a matter of law that Utah Power is liable to the Landowners under one or more of the alternative theories under the Circuit Order's factual statement, would give license to Utah Power to operate in any way it deems fit, regardless of the damage or injury caused to downstream owners form intentionally discharged water overflowing the bank. This manifestly unjust and unreasonable result would be a grave miscarriage of justice, would sacrifice the Landowner's private property rights without just compensation on the basis of economic or social expediency, and promote the profits self-interest of Utah Power at the expense of the Landowners without just compensation.

Constitutionally the judiciary is the protector of individual liberties and property rights. Permitting loss to the Landowners under certified facts without any remedy under the alternative theories is a deprivation of due process.

The Landowners earnestly appeal to and rely upon the Court's wisdom, fairness, and sense of justice in answering the state law questions certified in such manner as to vindicate the law's protection of persons situated as these Landowners.

CONCLUSION

It is respectfully submitted that under Idaho law as it is or should be recognized, applied to the factual statement and findings in the Circuit's Order, requires that Utah Power be held liable as a matter of law under each of the state law questions certified and accepted by this Court, and that the Circuit Court be so advised.

DATED this _____ day of September, 1989

RACINE, OLSON, NYE, COOPER & BUDGE, CHARTERED

By _____
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No. 90-856

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

WAYNE KUNZ; OLIVE KUNZ;
GLEN V. TURNER; CAROL TURNER, ET AL.,

Petitioners,

v.

UTAH POWER & LIGHT CO., a Utah corporation,

Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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RULE 29.1 LIST

At the time of trial the defendant was Utah Power & Light Company, a Utah corporation. Pursuant to a merger effective January 9, 1989, the correct name of the defendant became Utah Power & Light Company, an assumed business name of PacifiCorp, an Oregon corporation. A list of non-wholly owned subsidiaries of PacifiCorp is included in *Appendix* 1a.

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Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Petitioners' ("Landowners") sparse factual recitation is misleading and incomplete. Because Landowners focus entirely on what they characterize as Utah Power & Light Co.'s ("Utah Power" or "UP&L") *intentional* or *deliberate* conduct, an amplification and correction of the material facts is necessary to put that conduct in the full and proper perspective.

The Bear Lake-Bear River irrigation storage system is accurately described in *Kunz v. Utah Power & Light Co.*,

526 F.2d 500, 501 (9th Cir. 1975) (*Kunz I*).[1] Utah Power's authority to own and operate the system derives from "various federal statutes, a 1920 Federal District Court decree, and more recently the Bear River Commission (established by the Bear River compact, a joint effort of Idaho, Utah and Wyoming)." *Id.* at 501-02. The chairman of the Bear River Commission is appointed by the federal government. Prior to the construction of the system in 1917, Landowners' property was flooded every year by the natural spring runoff. Although the system was designed to harness the spring runoff and make the water available for irrigating farm land, no implementing statute or decree imposed any flood control responsibility on UP&L. *Id.* at 502. However, *Kunz I* held that because UP&L had voluntarily undertaken flood control efforts upon which the Landowners had reasonably relied, UP&L "had a duty of care on which liability for *negligent* damage can be based." *Id.* at 504 (emphasis added). The court emphasized that its decision was based on negligence principles:

> Under these circumstances, Utah Power must carry the responsibility for avoiding damaging floods. We do not say that it is absolutely liable for flooding, but it must recognize the dependent position in which downstream ranchers

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[1] Landowners repeatedly characterize UP&L's actions as an intentional "discharge." However, there is no dam on the lake. A pumping station controls flow to or from the lake. When the lake is full, UP&L simply stops pumping, the inlet to the lake is closed and the flow continues down the river as it naturally would. This is known as a "bypass." When water flows from the lake into the outlet canal it is a "release." *Kunz I* at 501.

> have been placed and act accordingly to try, consistent with its other duties, to control floods.

Id. at 504. Thus, UP&L's *only* legal flood control responsibility was *created* through the application of negligence principles.[2]

There are significant competing interests which are affected by the operation of the system. Over 150,000 acres of irrigated farm land depend on annual storage of adequate water supplies. A large recreational industry sustains many economic livelihoods. A significant fishery interest, including four species endemic to Bear Lake, requires certain minimal levels for survival. Utah Power attempts to balance its operation of the system to maximize the protection afforded to all these interests, including its flood control responsibility.[3]

The critical period each year is the spring runoff, approximately April through July. Bear Lake is at its maximum capacity at elevation 5923.65 feet above sea

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[2] The application of these principles was confirmed by the Idaho Supreme Court in *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 903, 792 P.2d 926, 928 (1990) at n. 2.

[3] The Idaho Supreme Court approved this process, stating: "Utah Power, by diverting and storing, and later releasing the flood waters of the Bear River back into the natural channel, is carrying out its duty to 'balance the competing factors, including irrigation, flood control, fish and wildlife, recreation and power generation.' [Citation omitted.] Balancing these competing and often conflicting interests as it must, Utah Power is only held to a standard of reasonableness, i.e., negligence." *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 906, 792 P.2d 926, 931 (1990).

level. Under normal operations, UP&L attempts to regulate the lake to produce, on April 1, an elevation of 5918. This level gives UP&L the capacity to handle a spring runoff of 515,000 acre feet. A normal runoff is 203,000 acre feet and, prior to 1983, the maximum spring runoff in the system was 434,000 acre feet.

Utah Power's target is adjusted as it monitors lake elevation and receives U.S. Soil Conservation Service (SCS) runoff forecasts and snow pack reports. These are reviewed and analyzed in light of UP&L's historical experience spanning six decades. Until April 1983, the SCS monthly runoff forecasts were at or below normal. On April 1, the runoff forecast was 205,000 acre feet, a normal runoff. On that date UP&L had 445,000 acre feet of capacity, 217% of the forecasted runoff and also in excess of the previous record high runoff. Due to extremely unusual weather conditions in May and June, the actual runoff was 528,000 acre feet and the runoff period was eight weeks rather than the normal sixteen. This runoff was 258% of that forecasted on April 1 and 23% greater than the historical high. The river flows above the system were so high that Stewart Dam, which diverts Bear River into the canal system, nearly washed away. Bear Lake filled to capacity, the inlet to the lake was closed and the remaining natural flow continued down the river and caused the flooding Landowners complain of.

At the end of the irrigation season, when the natural flow subsided, UP&L was faced with a difficult decision. The lake was full and without significant releases, which would likely cause flooding during the non-growing season, it would be impossible for UP&L to create storage capacity in the lake sufficient to control and contain the

spring runoff the following year. Every witness, including Landowners' expert,[4] agreed that the only prudent thing for UP&L to do was attempt to evacuate as much of the lake as possible during the non-growing season to prevent floods and allow planting during the spring runoff the next year. This evacuation effort did produce some additional flooding during the non-growing season.[5]

Unfortunately, and despite every evacuation effort, the spring runoff in 1984 set a new record of 573,000 acre feet and the same circumstances were repeated. That record was exceeded again in 1986 with a runoff of 608,000 acre feet. Thus, the three highest spring runoffs in the history of the Bear Lake system dating back to 1917 occurred in the successive years of 1983, 1984 and 1986. Despite UP&L's efforts to provide a significant safety factor in favor of flood control in its operation of the system, these extraordinary and unforeseeable spring runoffs exceeded the capacity of the system and resulted in flooding to Landowners.

Landowners' claims throughout this matter have been that UP&L negligently failed to anticipate the spring runoff, failed to provide adequate storage space for that runoff and failed to operate the system prudently after the runoff. *Appendix* 4a-5a. Such decisions are *intentional* or *deliberate* only in the sense that they are *operational, i.e.,*

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[4] *See, e.g.,* excerpts of the testimony of Dr. Charles Brockway, Landowners' hydrology and engineering expert, *Appendix* 2a-3a.

[5] In 1983, 1984 and 1986 there were some months with no flooding. In 1985 the flooding lasted less than 30 days.

the same kind of judgments any irrigation system operator must make in evaluating, planning for and accommodating runoffs, water needs and other competing interests. Because water is such a valuable resource in an arid state like Idaho, the Idaho Supreme Court held[6] that such decisions will produce liability for flooding only when they are negligent, *i.e.*, "the failure to use . . . the care a reasonably careful person would use under circumstances similar to those shown by the evidence."[7] Landowners are not left without a remedy, but their sole remedy is conditioned on their ability to prove that UP&L acted negligently in operating the system under the circumstances of the case.

SUMMARY OF THE ARGUMENT

This Court will only consider issues which have been properly raised and disposed of in the lower courts or which present a federal question of sufficient importance and widespread application as to require the guidance of

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[6] "This Court has long been cognizant of the crucial role which artificial water systems serve in this state. As a result, limited liability rules have been applied to operators of these artificial water systems. . . . The same policies which compelled this Court to limit the liability of operators of irrigation canals from suit for all but an action in negligence also extends to those entities which operate the artificial water diversion and storage systems, *i.e.*, dams and reservoirs which supply the water to the irrigation canals." 117 Idaho at 904, 792 P.2d at 929.

[7] Excerpt of negligence instruction given by the trial court. *Appendix* 7a.

this Court. Landowners have never previously raised the 5th and 14th Amendments as a basis for their claim that an absolute liability standard should be applied to the conduct of UP&L.

Likewise, the Petition does not raise important federal questions which require consideration by this Court. Water law is a matter which varies widely from state to state, depending on history, geography, economy and climatic conditions.[8] Landowners have pointed to no conflict among state courts, federal circuit courts or other decisions of this Court which consideration of these issues would resolve. What was solely at issue in this *diversity* case is an important point of Idaho water law on which definitive guidance by the Idaho Supreme Court was sought and received pursuant to Landowners' request. *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 792 P.2d 926 (1990).

Finally, Landowners' repeated claim that they have been left without a remedy is without merit. The decision in favor of many of these same Landowners in *Kunz I* establishes the existence of a remedy. However, that remedy requires proof of negligence and Landowners' attempted reliance on the 5th and 14th Amendments for

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[8] The Idaho Supreme Court noted these issues: "For instance, why does Idaho case law limit the theories of liability which can be brought against a irrigation system operator whose canal floods over its banks, . . . The answer to this legal question is based almost entirely on the unique circumstances of Idaho's geography and economy. 'The water of this arid state is an important resource. Not only farmers, but industry and residential users depend upon it.' " 117 Idaho at 904, 792 P.2d at 929 (citations omitted).

the first time in this Petition is simply a poorly hidden effort to have this Court impose an absolute liability standard on conduct which is and should be governed by negligence principles. To the extent that Landowners could legitimately claim a *taking* through inverse condemnation, a dubious proposition at best, such a remedy exists under Idaho law and does not require consideration of constitutional issues. Landowners simply failed to pursue such a claim in this matter; they were not prevented from doing so.

ARGUMENT

1. *Landowners failed to preserve the constitutional issues below.* In their Petition, Landowners claim that the provisions of the 5th and 14th Amendments to the U.S. Constitution have been violated by the failure of both the Ninth Circuit and Idaho Supreme Courts to recognize "absolute liability"[9] and "inverse condemnation" as viable theories of recovery under these facts. This Court has held on numerous occasions, either in denying or dismissing as improvidently granted a Petition for Writ of Certiorari, that a threshold consideration is whether the federal grounds urged in support of the Petition have

[9] While Landowners couch their arguments in terms of "intentional tort" vs. "negligence," it is clear that their sole position in all the lower courts was that they are entitled to recovery without the burden of proving UP&L acted negligently, *i.e.*, that UP&L is absolutely liable for any flooding which occurred. Whether characterized as "intentional tort," "strict liability," "trespass" or "nuisance," the thrust is the same here.

previously been raised and ruled upon in the lower courts. "We ordinarily will not decide questions not raised or litigated in the lower courts." *Springfield v. Kibbe*, 480 U.S. 257, 259, 94 L.Ed.2d 293, 297, 107 S.Ct. 1114 (1987). *See also DeShaney v. Winnebago Soc. Ser.*, 489 U.S. 189, 103 L.Ed.2d 249, 109 S.Ct. 998 (1989); *Patrick v. Burgett*, 486 U.S. 94, 100 L.Ed.2d 83, 104 S.Ct. 1658 (1983); *Oneida v. Oneida Indian Nation*, 470 U.S. 226, 84 L.Ed.2d 169, 105 S.Ct. 1245 (1985); *Adicks v. Kress & Co.*, 398 U.S. 144, 26 L.Ed.2d 142, 90 S.Ct. 1598 (1970). The burden is on the petitioner to clearly demonstrate that the federal grounds urged in the petition were raised and ruled upon in the lower courts. *Mitchell v. Oregon Frozen Food Co.*, 361 U.S. 231, 4 L.Ed.2d 267, 80 S.Ct. 365 (1960). Although Landowners have consistently argued that some form of absolute liability theory should be applied in this case, they have never previously relied on the 5th and 14th Amendments to the U.S. Constitution in support of that argument.

In their complaint, Landowners never asserted that failure to recognize alternative absolute liability theories violated the 5th and 14th Amendments. They asserted jurisdiction on the basis of diversity only. *Appendix* 4a-6a (additional excerpts from Landowners' Second Amended Complaint; *see also* Pet. Appendix 36a-39a). Landowners did not propose a single jury instruction which raised the 5th and 14th Amendments or the theory of inverse condemnation. *Appendix* 8a-22a (excerpts of all jury instructions supporting non-negligence legal theories proposed by Landowners but not given by the trial court). In their appeal to the Ninth Circuit, Landowners did not raise, as an issue for consideration, any proposed application of

the 5th and 14th Amendments. *Appendix* 23a-24a (excerpts from Landowners' opening brief).

The same materials also demonstrate that Landowners have failed to raise and pursue any claim for inverse condemnation in this matter. To the extent that Paragraph XII of the Kunz Second Amended Complaint (Pet. Appendix 38a) asserts any *taking*, it relates solely to alleged erosion of the river bank due to fluctuations in the level of the river; it has nothing to do with flooding. To the extent that Landowners have implied or mentioned inverse condemnation or due process in their Reply Brief to the Ninth Circuit or in the briefs to the Idaho Supreme court, it is clear that the application of the *federal constitution* was never raised. A careful reading of both the Ninth Circuit and Idaho Supreme Court opinions demonstrates that due process considerations under *any* constitutional provision or inverse condemnation theory were not seriously advanced or considered.

Landowners' failure to raise and preserve any *federal constitutional issues* in the lower courts should require summary dismissal of the Petition.

2. *Landowners' Petition fails to raise an important federal question.* When an issue has not been raised in the lower courts, this Court will not consider it unless it is an exceptional issue which will materially advance judicial administration. *Carlson v. Green*, 446 U.S. 14, 64 L.Ed.2d 15, 100 S.Ct. 1468 (1980). Simply raising due process or constitutional issues is insufficient. *Youngberg v. Romeo*, 457 U.S. 307, 73 L.Ed.2d 28, 102 S.Ct. 2452 (1982); *G. D. Searle & Co. v. Cohn*, 455 U.S. 404, 71 L.Ed.2d 250, 102 S.Ct. 1137 (1982).

Whether an issue is of sufficient importance to justify review by this Court is addressed on a case-by-case basis, but it is

> a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and courts of the state, or some manner effecting the interests of this nation in its internal or external relations, demands such exercise.

Forsyth v. Hammond, 166 U.S. 506, 513, 41 L.Ed. 1095, 1099, 17 S.Ct. 665 (1897). In *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614 (1954), this Court commented on more than 60 cases dismissed as being improvidently granted, noting:

> In some instances an asserted conflict turned out to be illusory; in others a federal question was wanting or decision could be rested on a non-federal ground; in a number, it became manifest that the question was of importance merely to the litigants and did not present an issue of immediate public significance.

Id. at 79, 99 L.Ed. at 904, n. 2. *See also Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 67 L.Ed. 712, 714, 43 S.Ct. 422 (1923) ("it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles of settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal"). The issues of whether absolute liability or inverse condemnation theories should be applied to the conduct of UP&L in this case are of importance

only to these parties, do not raise substantial federal questions and are adequately resolved on non-federal grounds.

Landowners' position that due process is offended when state law provides a remedy for negligent conduct but does not impose absolute liability for the same conduct is not only incorrect, but ignores the most fundamental principles concerning the creation of legal rights and causes of action for damages relating to the invasion of those rights. It is axiomatic that when the law creates a legal right, it also creates a remedy for the infringement of that right. However,

> [i]t is a well-settled principle that the law of the forum determines the remedies for the enforcement of substantive rights upon which a cause of action is based . . .
>
> . . . [T]he law of the place where the cause of action arose or the transaction occurred governs all matters going to the basis of the right of action itself. The merits of the controversy, the elements of the cause of action, and the substantive rights of the parties are determined by the law of that state.

1 Am.Jur.2d, *Actions*, § 6 (1962). Since *Erie Ry. Co. v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817 (1938) federal courts have always applied the substantive law of the state in diversity cases. More particularly, both the *existence* and *extent* of legal tort liability is governed by the law of the jurisdiction where the tort was committed. *Young v. Masci*, 289 U.S. 253, 77 L.Ed. 1158, 53 S.Ct. 599 (1933); *Cuba Ry. Co. v. Crosby*, 222 U.S. 473, 56 L.Ed. 274, 32 S.Ct. 132 (1912). Thus, state law determines whether an

individual has a legal right, the invasion of which produces a cause of action. The parameters of that right and the proof required to establish liability for damage to that right is subject to the control of the state. This is the reason why one state may recognize strict liability as a viable liability theory in a flooding situation where a majority, such as Idaho, do not.[10] In either event, characterization of the conduct of the defendant as *negligent* or *intentional* is of little value since it is the law of the state that determines whether and under what conditions that conduct, however it may be described, produces liability.

The Idaho Supreme Court has conclusively held that liability for flooding is imposed on operators of artificial water diversion and storage systems in Idaho only when operating decisions are negligently made. *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 792 P.2d 926 (1990). More specifically, these Landowners' *only* legal right is to be protected from flooding which results from the negligent operation of the Bear Lake-Bear River system by Utah Power. *Id.* The circuit court, as it is obligated to do, appropriately applied this law in its decision.

Due process principles are not offended by a rule of law which imposes liability only for negligent conduct which invades or injures a legal right created, in the first instance, by the application of common law negligence principles. Utah Power's *intentional* conduct is analogous to the driver of an automobile who, when confronted with a child who darts into his path, intentionally

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[10] *See, e.g.*, discussion and cases collected at 78 Am.Jur.2d, *Waters*, §§ 211-219 (1975).

swerves into a parked car, with full knowledge that damage will occur. The liability for such conduct is judged by negligence standards because the inquiry focuses on whether a reasonable man would have acted in like manner under the same circumstances. Under the facts of this case the Idaho Supreme Court has held that UP&L's conduct will be judged by the same standard. The 5th and 14th Amendments cannot and should not be used to impose a legal standard on tortious conduct in any individual state. To do so would impose a national standard of liability for all tortious conduct in derogation of the existing rules which may vary widely from state to state. This Court has previously held that due process is satisfied when liability is imposed for conduct in one state which would be immune from liability in another state. *Young v. Masci, supra* at p. 12. The same should be true for a state law which imposes a negligence standard rather than an absolute liability standard on certain conduct, whether that conduct is arguably intentional or not. Clearly, no substantial federal questions have been raised and the issues are adequately resolved by the application of Idaho law by the federal courts.

3. *An adequate state remedy exists.* This Court will not consider a case where "a federal question was wanting or decision could be rested on a non-federal ground . . . " *Rice, supra* at p. 11. *See also Jankovich v. Indiana Toll Road,* 379 U.S. 487, 13 L.Ed.2d 439, 85 S.Ct. 493 (1965). This Court will also refrain from deciding constitutional issues if the decision can rest on an adequate non-constitutional basis. *Meese v. Southern Ry. Co.,* 350 U.S. 77, 100 L.Ed. 60, 76 S.Ct. 131 (1955). Landowners' contention that their tort remedy has been unconstitutionally limited is more

appropriately an issue relating to the creation, construction and application of Idaho state law. See discussion at pp. 12-14, *infra*. As long as any legal right vested in these Landowners to be protected from flooding does carry a remedy, the proof, theories and standards which govern both the creation of the right and the remedy for the damage to the right are matters solely of state tort law and do not involve constitutional considerations.

The same analysis applies to the Landowners' alleged inverse condemnation claim. Initially, it has been previously noted that Landowners' complaint, requested instructions and briefs in the lower appellate courts have never raised or pursued inverse condemnation as a viable theory in this matter. See discussion at pp. 9-10, *infra*. In addition, the facts of this case fail to establish a constitutional *taking* under inverse condemnation principles. This case is closely analogous to *Sanguinetti v. U.S.*, 264 U.S. 146, 68 L.Ed. 608, 44 S.Ct. 264 (1924) where it was alleged that the government had built the subject canal with insufficient capacity to contain and a failure to reasonably anticipate the spring floods. Although flooding occurred during several years, this Court rejected the claim because the flooding did not consist of "intermittent but inevitably recurring overflows" which were "the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property." *Id.* at 148, 68 L.Ed. at 610. The Court further held that "[i]f the case were one against a private individual, his liability, if any, would be in tort." *Id.* at 150, 68 L.Ed. at 610. If a taking is to be established, there must be evidence that the flooding is caused by and would not have occurred in the

absence of the subject facilities. *Sanguinetti; U.S. v. Sponenbarger,* 308 U.S. 256, 84 L.Ed. 230, 60 S.Ct. 225 (1939). The benefits of the system are also to be considered and "[e]nforcement of a broad flood control program does not involve a taking merely because it will result in an increase in the volume or velocity of otherwise inevitably destructive floods, where the program measured in its entirety greatly reduces the general flood hazards, and actually is highly beneficial to a particular tract of land." *Sponenbarger,* 308 U.S. at 266, 84 L.Ed. at 238. *See also Bartz v. U.S.,* 633 F.2d 571 (Ct.Cl. 1980); *Accardi v. U.S.,* 599 F.2d 423 (Ct.Cl. 1979).[11] It is clear in this case that Landowners have received, since 1917, significant flood protection that would not have been available without the construction of the facilities. Otherwise, annual floods were inevitable. The analysis of these cases directly applies.

More importantly, to the extent that Landowners could legitimately claim that UP&L's conduct constitutes a constitutional taking under inverse condemnation principles, such a claim would require the application of Idaho state law which, by constitutional provision, statute and case law, already recognizes a viable inverse condemnation claim.[12] If the Landowners' inverse condemnation theory was viable there was certainly an

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[11] Both cases confirm, in factual situations extremely analogous to the instant case, that no taking occurs and that any claim for damages is one in tort based on negligence principles.

[12] *See* Idaho Constitution, Art 1, § 14 (*Appendix* 25a); I.C. § 7-701 (*Appendix* 26a-27a); *Marty v. State,* 117 Idaho 133, 786 P.2d 524 (1989); *Turcotte v. State,* 84 Idaho 451, 373 P.2d 569 (1962); *Renninger v. State,* 70 Idaho 170, 213 P.2d 911 (1950).

adequate legal basis in state law to be applied by the federal district court below. There is no question of federal constitutional law that needs to be considered. Landowners' thinly-veiled attempt in this proceeding is to have this Court institute and allow them to proceed on an inverse condemnation claim that was never pled or pursued in the first instance and has long since expired.

Thus, Landowners' claim that their federal constitutional right to pursue an inverse condemnation action has been denied in the lower courts should be rejected by this Court as a result of (1) their failure to raise and pursue such a claim at any time in the lower courts; (2) the lack of any merit to the claim on the facts of this case; and (3) the presence of adequate state grounds upon which such a claim could have been pursued, thereby eliminating the need to consider any federal issues.

CONCLUSION

Landowners have failed to raise and preserve, in any of the lower courts, including the Idaho Supreme Court, the federal constitutional issues they now assert. Landowners' contention that federal constitutional provisions require the imposition of an absolute liability standard in lieu of the negligence standard appropriately applied is without merit and contrary to fundamental principles which govern the creation of legal rights and remedies for damage to those rights. Landowners' claim that federal constitutional considerations should allow them to pursue an inverse condemnation theory should be rejected because such theory was never raised or pursued

below, is factually without merit and is subject to an adequate non-federal ground. Landowners' Petition for Writ of Certiorari to this Court is unjustified, without merit and should be denied.

Respectfully submitted,

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January 23, 1991

APPENDIX 1

NON-WHOLLY OWNED SUBSIDIARIES
OF PACIFICORP

Equitec Financial Group, Inc.
Flight Dynamics, Inc.
Arnav Systems, Inc.
NERCO, Inc.
Energy Investors Management, Inc.
Pacific Telecom, Inc.
North American Energy Services Company
Black Swan Gold Mines Ltd.
Kamcom Mines, Ltd.
Rycon Mines, Ltd.
Ryan Mines, Ltd.
Vol Mines, Ltd.
War Eagle Mining Company, Inc.
Black Lake Pipe Line Company
Security Offshore Insurance, Ltd.
Catalina Marketing
Gem State Utilities Corporation
Hutchinson Telephone
Independent Telephone Network
International Communications Holdings, Inc.
International Satellite, Inc.
PSI Holding, Inc.
Interior Telephone Company
Lan'Tel, Inc.
MicroRim
Northwestern Telephone Systems, Inc.
Alltelecom, Inc.
PTI Integrated Digital Services, Inc.
Satellite Technology Management, Inc.
Summation
I-5 Cellular, Inc.
U.S. Intelco Network, Inc.

APPENDIX 2

Transcript, Vol. IX, p. 153, ll. 3-15

* * *

Q Insofar as the flooding that began in 1983, do you feel the company was prudent in their decisions in managing that flood condition once they were in the middle of it?

A Well, once you're in the middle of it, you're – you're constrained by the system and many times there's not – not many alternatives. But as far as the summertime operation after the end of May, if you're full there's not – there's nothing you can do. You have to pass everything.

After the peak, then you begin to have some more alternatives as to what you can do to go ahead and try to get – get the lake down, but again, you've got to get rid of the water, so you've got to use all the capacity that you can when you can and try to minimize the impact on the downstream users.

* * *

Transcript, Vol. X, p. 38, l. 24 – p. 39, l. 6.

* * *

Q Okay. But after the runoff ceases if the lake is still full, I understood you to say that you've got to get rid of the water so that you can have enough capacity by next year to contain the runoff.

A That's usually the plan.

Q And you agree that that's the appropriate plan, that's the thing you need to do?

A Yes.

* * *

APPENDIX 3

IN THE DISTRICT COURT OF THE UNITED STATES
DISTRICT OF IDAHO

WAYNE and OLIVE KUNZ, husband and wife, et al; Plaintiffs,	)	Civil No. 84-4085
vs.	)	SECOND AMENDED COMPLAINT
UTAH POWER & LIGHT CO., a foreign corporation, Defendant.	)	

* * *

SECOND CAUSE OF ACTION

15.

Plaintiffs replead the allegations of paragraphs 1 through 14 and incorporate the same herein by reference as if set forth fully.

16.

Plaintiffs' lands were flooded and damaged as a direct and proximate result of Defendant Utah Power & Light Company's negligence and lack of due care in:

(a) Failing to manage and regulate the volume of water in the Bear River between Bear Lake and Soda Reservoir to prevent flooding, injury, and damage to Plaintiffs' crops and lands.

(b) Failing to exercise reasonable care and foresight in maintaining the natural channel of the Bear River through the Plaintiffs' properties and remedying the

gradual reduction of the natural channel by deposits of sediments caused by the existence of Defendant's dams and reservoirs along the river.

(c) Failing to warn of flooding known to Defendant but unexpected by Plaintiffs which occurred subsequent to the spring runoff and after Plaintiffs commenced planting, rearing, and harvesting of their crops, reasonably believing that heavy spring runoff had subsided and Defendant would operate the Bear River/Bear Lake water storage system in such a manner that all flows would be contained within the natural channel.

(d) Failing to properly manage and regulate the Bear River/Bear Lake water storage system to prevent flooding.

(e) Failing to properly observe and accurately forecast winter snowpack and resulting runoff and flow conditions in the Bear River drainage.

(f) Failing to provide adequate storage capacity to hold anticipated high spring runoff.

* * *

FOURTH CAUSE OF ACTION

19.

That Defendant's flooding of Plaintiffs' property constituted a trespass and a nuisance.

FIFTH CAUSE OF ACTION

20.

Plaintiffs, Wayne and Olive Kunz, reallege paragraphs 1 through 19 as though set forth fully herein.

21.

As a direct and foreseeable result of the negligence and lack of due care by Defendant Utah Power & Light, Plaintiffs Wayne and Olive Kunz have suffered damages in the amount of $233,893.21, and the full extent of Plaintiffs' damages has not been ascertained and Plaintiffs reserve the right to amend their Complaint at the time of trial.

22.

Defendant Utah Power & Light is also strictly liable to Plaintiffs Kunz for said damages because Defendant Utah Power & Light altered the natural stream flow of the Bear Lake/Bear River water storage system in such a way as to allow water that was not naturally present to cause the foreseeable damage to the above-named Plaintiffs should it negligently escape.

* * *

APPENDIX 4

INSTRUCTION NO. 9

When I use the word "negligence" in these instructions, I mean the failure to use ordinary care in the management of one's property or person. The words "ordinary care" mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence. Negligence may thus consist of the failure to do something which a reasonably careful person would do, or the doing of something a reasonably careful person would not do, under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.

APPENDIX 5

INSTRUCTION NO. 15

In this case, the Plaintiffs allege that the Defendant Utah Power & Light Company is liable for flooding damages to their lands based upon the various legal theories. These theories include: negligence; absolute liability; trespass; intentional unreasonable discharge; nuisance. Utah Power & Light may be held liable under any *one or more* of these theories as established by the evidence. It will not be liable if you find that *none* of the theories are proved under the evidence. For Plaintiffs to recover, it is only necessary that they prove *one* of the legal theories under the evidence. The elements and proof required to prove the theories are different. The following instructions state what is required to prove each theory. You must evaluate each theory, and the elements of proof necessary, separately from the other theories, and decide each theory separately in the special verdict form which will be provided to you.

The Defendant Utah Power & Light Company asserts "act of God" as an affirmative defense. Utah Power & Light Company has the burden of proof in establishing the "act of God" affirmative defense. The following instructions outline for you what is required to be proven by the parties in establishing their respective theories.

INSTRUCTION NO. 20

You are instructed that no one is permitted to so use his own property as to invade the property rights, or cause injury or damage to the property of another.

INSTRUCTION NO. 21

Where a person for his own purposes constructs on his land or permits to be constructed there something which is likely to cause injury to others, such person acts at his peril, and if it causes injury to others, he is answerable in damages for the natural consequences, regardless of whether or not such person reasonably operates the thing constructed.

INSTRUCTION NO. 22

Where a person for his own purposes constructs on his lands or permits to be constructed there, something which is likely to cause injury to others, such person acts at his peril, and if it causes injury to others, he is answerable in damages for the natural consequences.

INSTRUCTION NO. 23

One who by wrongful acts augments, diverts, or accelerates the forces of nature in such a manner as to injure another is liable for damages therefor.

INSTRUCTION NO. 26

An upper landowner is entitled to alter the natural flow of surface water by collecting and concentrating it, so long as it is done without damage to the lower landowner. However, the upper landowner is liable to the lower landowner if by collecting and concentrating the flow of surface water, it is carried across the lower landowner's property in a manner different than did exist and which results in damage to the lower landowner.

INSTRUCTION NO. 27

An owner of land cannot increase the burden upon a lower landowner by changing the natural system of drainage in a manner which causes damage to the lower land because of more concentrated discharge unless it is kept within the accustomed channels of the natural water course.

INSTRUCTION NO. 28

An upper landowner who collects the natural drainage for his purpose, may discharge it into a natural water course so long as the discharge is not injurious to the lower landowners. However, the upper landowner may not collect waters and then discharge in volumes injurious to lower landowners. Concentrating or augmenting the water flow beyond the confines of the natural water course makes the upper landowner liable for any damages caused to the lower landowner by reason of such conduct.

INSTRUCTION NO. 29

An owner of lands abutting upon a natural stream has no right to place obstructions into the stream for the purpose of changing the natural course of the river, or for any other purpose that would do damage to a landowner on the stream, either above or below such obstruction.

INSTRUCTION NO. 30

You are instructed that a person or corporation has no right to so obstruct a natural drain channel as to divert or impound waters upon the property of another and if such obstruction causes injury or damage to the property of another, the party causing the obstruction is liable to the party whose property was so damaged.

INSTRUCTION NO. 31

An upper landowner may not increase the burden upon lower lands by accumulating surface waters with man-made structures and discharging those accumulated waters, through an artificial channel or a natural channel onto the lower lands in a manner different than what would have occurred by natural drainage, and is liable to damage suffered by the lower landowner if he does it.

INSTRUCTION NO. 32

An upper landowner has an easement of drainage across the land of a lower landowner, to the extent of water naturally flowing from the higher ground to the lower tract, but this easement cannot be augmented by acts of the upper landowner and, where it is so augmented, the upper landowner is liable for any damage caused to the lower landowner by reason of it.

INSTRUCTION NO. 33

A property owner may not so interfere with the natural flow of surface waters as to cause an invasion of a neighboring owner's interest in the use and enjoyment of his land.

INSTRUCTION NO. 36

You are instructed that a utility or dam owner in constructing dams or related waterflow or power production facilities over a natural drainage channel must provide for such floods as may be reasonably anticipated in view of the history of the channel and the natural conditions affecting its flowage, and although reasonable care may have been used in the original construction, if subsequent developments prove their insufficiency, it becomes the duty of the utility or dam owner to meet the changed conditions.

INSTRUCTION NO. 37

Utility operators must learn of dangers that lurk in the construction and maintenance of their facilities and Utah Power & Light Company owed a duty to know of danger incident to the alteration of a natural stream channel.

INSTRUCTION NO. 38

You are instructed that although the rainfall and melting of snows and resultant run-off waters in the years here involved may have been more than ordinary, yet if they were such as could have occurred, though at irregular intervals, it may be foreseen that they might occur and if not previously actually occurring in identical

quantities, still be foreseeable. It is the duty of those changing or restraining the flow of water to provide against the consequences that will result from such changes, including a duty to act reasonably in control of floods.

INSTRUCTION NO. 39

It is established that the ordinary, natural drainage of water cannot lawfully be changed for the benefit of one person or class of persons to the injury of another. Therefore, one who changes the course of a stream must do so in such a manner as not to injure, or unduly interfere with, the rights of an adjoining landowner, either above or below or on the opposite side of a stream. Thus, he may not, by changing the direction, location, or concentration of the flow of the stream, so increase or diminish its velocity as to cause damage to the land of an adjoining proprietor, or impair the latter's rightful use of the stream; nor can he make any change or diversion of the stream, although on his own land; which will cause a washing of mud and debris on the land of his neighbor, to the injury of the latter, which injury at the time and manner would not have occurred had it not been for the change in the stream.

INSTRUCTION NO. 61

Where a person for his own purposes constructs on his land or permits to be constructed there something

which is likely to cause injury to others, such person acts at his peril, and if is causes injury to others, he is answerable in damages for the natural consequences, regardless of whether or not such person reasonably operates the thing constructed.

INSTRUCTION NO. 63

Regarding the claim for "intentional and unreasonable discharge," the Plaintiffs have the burden of proving each of the following propositions:

1. That the Defendant intentionally discharged flood waters;

2. That said discharge was unreasonable;

3. That flooding of the lands of one or more of the Plaintiffs resulted therefrom.

In this case the Defendant asserts the affirmative defense of "Act of God", defined elsewhere in these instructions. The Defendant has the burden of proving this affirmative defense.

If you find from your consideration of all the evidence that the propositions required of the Plaintiffs have been proved on this theory, and that the Defendant's affirmative defense has not been proved, then your verdict should be for any such Plaintiff. If you find from your consideration of all the evidence that the propositions required of the Plaintiffs have not been proved, or that the Defendant's affirmative defense has been proved, then your verdict should be for the Defendant.

INSTRUCTION NO. 64

Regarding the claim for trespass, Plaintiffs have the burden of proving each of the following propositions:

1. That the Defendant caused a physical invasion or intrusion of flood waters upon one or more of the Plaintiff's lands;

2. That said Plaintiff(s) did not consent to such physical invasion or intrusion;

3. That any such Plaintiff's land was harmed by the physical invasion or intrusion.

In this case the Defendant asserts the affirmative defense of "Act of God", defined elsewhere in these instructions. The Defendant has a burden of proof to establish the affirmative defense.

If you find from your consideration of all the evidence that the propositions required to be proven by the Plaintiffs have been proved, then your verdict should be for any such Plaintiff on this theory. If you find from your consideration of all the evidence that any of the propositions required to be proved by the Plaintiffs have not been proved, or that the Defendant's affirmative defense has been proved, then your verdict should be for the Defendant.

INSTRUCTION NO. 65

A trespass may be committed by casting any substance or instrumentality upon the land of another, including by discharging water on it, and it is immaterial whether or not the person committing the trespass is in the exercise of due care for liability to lie.

INSTRUCTION NO. 66

Regarding a claim for nuisance, Plaintiffs have the burden of proving each of the following propositions:

1. That the conduct of the Defendant resulted in an intentional invasion of one or more of the Plaintiff's interest in the use and enjoyment of their land;

2. That such invasion was unreasonable because the gravity of the harm inflicted on any such Plaintiff outweighs the utility of the Defendant's conduct.

In this case the Defendant asserts the affirmative defense of "Act of God", defined elsewhere in these instructions. The Defendant has the burden of proving the affirmative defense.

If you find from your consideration of all the evidence that the propositions required of the Plaintiffs have been proved on this theory, and that the Defendant's affirmative defense has not been proved, then your verdict should be for any such Plaintiff. If you find from your consideration of all the evidence that one or more of the propositions that Plaintiffs are required to prove has not been proved, or that the Defendant's affirmative

defense has been proved, then your verdict should be for the Defendant.

INSTRUCTION NO. 67

A nuisance is an intentional invasion of another's interest in the use and enjoyment of land which is unreasonable because the gravity of the harm outweighs the utility of the actor's conduct.

Whether a nuisance exists under this legal definition is for your to decide.

INSTRUCTION NO. 68

You are instructed that in cases of trespass or nuisance, the person responsible may be unable, no matter how careful, to avoid injury to the lands of another, but, again, he knows that injury may result from the nature of his activities regardless of care. Under such circumstances he also assumes the risk. The responsibility for injury lies in creating or maintaining the harmful condition.

INSTRUCTION NO. 69

Under the principle of "absolute liability" or "liability without negligence" as referred to in the previous

instruction, liability rests not upon negligence, but upon the rule that where a person alters a natural stream channel so as to divert and/or impound waters in a manner which is likely to cause injury to others, such person acts at his peril and if the escaping waters cause injury to others, he is answerable in damages for the natural consequences, regardless of whether or not he reasonably operates the diversion and storage facilities.

Stated another way, this principle of "absolute liability" may be explained as follows:

A person may be liable in damages even though he acted without negligence under certain circumstances. For example, whatever one may do with surface waters, or with flood waters, he may not cast the natural flow of a stream onto the land of others who are under no obligation to receive the same.

Negligence, willfulness, or wantonness are utterly immaterial to the right to recover compensatory damages if the Plaintiff's premises were not subject to an easement for the flow of the waters and the Defendant did not divert the waters onto such premises as a matter of right.

The willfulness required for recovery here is simply that the maintenance of the means of diversion be willful, that it be the willed action of the Defendant; it is immaterial whether the Defendant did or did not will the later damage which resulted.

INSTRUCTION NO. 70

Under the doctrine of "liability without fault" (also known as "absolute liability"), liability rests not upon negligence but upon the intentional doing of that which a person knows or should in the exercise of ordinary care know may in the normal course of events reasonably cause loss to another.

INSTRUCTION NO. 71

The essence of the rule of liability without fault is that if a person in the conduct or maintenance of an enterprise, which is lawful and proper in itself, deliberately does an act under known conditions and with knowledge that injury will in all probability result to another, and injury is sustained by the other as a direct and proximate cause or consequence of the act, the person doing the act and causing injury is liable in damages even though he acted without negligence.

INSTRUCTION NO. 72

Regarding the claim for "absolute liability", also known as "liability without fault", the Plaintiffs have the burden of proving each of the following propositions:

1. That the Defendant Utah Power & Light Company altered the natural stream channel by diverting

and/or impounding the natural flow of the Bear River drainage;

2. That one or more of the Plaintiff's property was damaged by flooding which resulted from such conduct;

3. That the conduct of the Defendant was a proximate cause of the property damage to such Plaintiff's lands resulting from such flooding.

In this case, the Defendant Utah Power & Light Company asserts the affirmative defense of "Act of God", defined elsewhere in these instructions. It has the burden of proof in establishing this affirmative defense.

If you find from your consideration of all the evidence that the propositions required to be proved by one or more of the Plaintiffs on this theory have been proved, and that the Defendant's affirmative defense has not been proved, then your verdict should be for any one or more of such Plaintiffs. If you find from your consideration of all the evidence that the propositions that one or more of the Plaintiffs are required to prove has not been proved, or that the Defendant's affirmative defense has been proved, then your verdict should be for the Defendant.

INSTRUCTION NO. 76

A riparian owner of lands abutting upon a stream has no right to place obstructions out into the stream for the purpose of changing the natural course of the river or for any other purpose that would do damage to a riparian

owner on the opposite side or to owners of land abutting upon said stream either above or below.

APPENDIX 6

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 87-4361

WAYNE KUNZ, ET AL., AND
GLENN V. TURNER, ET AL.,

Appellants

vs.

UTAH POWER & LIGHT COMPANY,

Appellee.

APPELLANTS' OPENING BRIEF

ISSUES PRESENTED

I.

Whether the trial court erred in failing to submit Landowners' alternative legal theories: "absolute" liability without fault for intentional alteration of natural flow of a stream under Idaho water law and/or *Rylands v. Fletcher* rationale; trespass; "reasonable use" standard of the *Restatement;* and private nuisance.

II.

Whether the trial court erred in its instructions to the jury on the applicable law of negligence.

III.

Whether the trial court erred in multiple evidentiary rulings admitting or excluding evidence which more probably than not taint the verdict and substantially prejudiced Landowners' rights.

* * *

ARGUMENT

I. THE TRIAL COURT ERRED IN REFUSING TO SUBMIT LANDOWNERS' ALTERNATIVE LEGAL THEORIES OF "ABSOLUTE" LIABILITY WITHOUT FAULT FOR INTENTIONAL ALTERATION OF NATURAL FLOW OF A STREAM UNDER IDAHO WATER LAW AND/OR THE RYLANDS V. FLETCHER RATIONALE; TRESPASS; "REASONABLE USE" STANDARD OF THE RESTATEMENT; AND PRIVATE NUISANCE.

Landowners contend that the alternative legal theories reflect established state water and property law principles under Idaho appellate decisions, and apply to the undisputed facts of this case. Since the modern federal rules of procedure liberally allow alternative claims and forms of relief to be plead (F.R.C.P. 8(a)(3) and (e)(2); *2A Moore's Federal Practice*, § 8.31; *Ryan v. Foster & Marshall, Inc.*, 556 F.2d 460 (9th Cir. 1977); *Transit Cas Co. v. Transamerica Ins. Co.*, 387 F.2d 1011 (8th Cir. 1967)), the trial court committed reversible error for refusing to submit the alternative legal theories. Each is discussed in turn below.

* * *

APPENDIX 7

Idaho Constitution, Article 1, § 14

* * *

§ 14. Right of eminent domain. – The necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state.

Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor.

APPENDIX 8

Idaho Code § 7-701

7-701. Uses for which authorized. – Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

1. Public buildings and grounds for the use of the state, and all other public uses authorized by the legislature.

2. Public buildings and grounds for the use of any county, incorporated city or school district; canals, aqueducts, flumes, ditches or pipes for conducting water for use on state property or for the use of the inhabitants of any county or incorporated city, or for draining state property for any county or incorporated city, raising the banks of streams, removing obstructions therefrom and widening, deepening or straightening their channels, roads, streets, alleys, and all other public uses for the benefit of the state or of any county, incorporated city or the inhabitants thereof.

3. Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, by-roads, plank and turnpike roads, steam, electric and horse railroads, reservoirs, canals, ditches, flumes, aqueducts and pipes, for public transportation supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for storing and floating logs and lumber on streams not navigable.

4. Roads, tunnels, ditches, flumes, pipes and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit or conduct of tailings or refuse matter from mines; also, an occupancy in common

by the owners or possessors of different mines of any place for the flow, deposit or conduct of tailings or refuse matter from their several mines.

5. By roads, leading from highways to residences and farms.

6. Telephones, telegraph and telephone lines.

7. Sewerage of any incorporated city.

8. Cemeteries for the burial of the dead, and enlarging and adding to the same and the grounds thereof.

9. Pipe lines for the transmission, delivery, furnishing or distribution of natural or manufactured gas for light, heat or power, or for the transportation of crude petroleum or petroleum products; also for tanks, reservoirs, storage, terminal and pumping facilities, telephone, telegraph and power lines necessarily incident to such pipe lines.

10. Snow fences or barriers for the protection of highways from drifting snow.

11. Electric distribution and transmission lines for the delivery, furnishing, distribution, and transmission of electric current for power, lighting, heating or other purposes; and structures, facilities and equipment for the production, generation, and manufacture of electric current for power, lighting, heating or other purposes.